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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-841

HON. CALE J. HOLDER, United States District Judge for the Southern District of Indiana,

Petitioner,

v.

ARTHUR BANKS,

Respondent.

BRIEF OF RESPONDENT

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C. The claimed violations of Rule 27 . . . . . .

D. The claim that Mr. Kunstler made certain statements after April 1, 1973 is irrelevant, unproved, and not before the Court. Beyond that, Petitioner has distorted Mr. Kunstler's alleged statements . . . . . .

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IN THE

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HON. CALE J. HOLDER, United States District Judge for the Southern District of Indiana,

Petitioner,

v.

ARTHUR BANKS,

Respondent.

BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

Petitioner, a United States district court judge who is represented in this Court by private counsel,[1] has sought to paint the picture of this case as one which centers on

[1] The Solicitor General evidently considered appearing on behalf of Petitioner. Indeed, he filed for and obtained an extension of time within which to file a Petition for a Writ of Certiorari. Thereafter, no appearance has been made in this case by the Solicitor General.

William M. Kunstler and whether he has the right to engage in conduct claimed to be in violation of court rules and ethical standards relating to pre-trial publicity.

This effort permeates the brief of the Petitioner to such an extent that there is hardly any mention of the factual and legal basis for what we submit are the main issues in this case, and the only ones to which the Court can or need address itself on the record before the lower court, namely, the right of Arthur Banks to be represented by counsel of his choice, even one who is disliked by the district court judge because of his political views.

The case has been offered to the Court as one on which it may pass upon the new Fair Trial-Free Press rules. For that reason, our "Counter-Statement of the Questions Presented" includes questions in that area although, as we have indicated above, we do not believe that the Court need go beyond the questions of the Sixth Amendment right to choice of counsel, as that right interacts with the defendant's and counsel's First Amendment rights.

Moreover, the factual presentation in Petitioner's brief as to what Mr. Kunstler in fact did is so distorted, and at the same time is so completely silent as to the statements and comments of the Petitioner from the bench which preceded and revealed his reasons for his refusing to permit Mr. Kunstler to represent Mr. Banks, that a detailed "Counter-Statement of the Case" is necessary. That statement is set forth below directly following our "Counter-Statement of the Questions Presented."

ADDITIONAL COURT RULES INVOLVED

Rule 29 of the Rules of the United States District Court for the Southern District of Indiana provides as follows:

RULE 29

The Conduct of Judicial Proceedings in Criminal Cases. Special Orders in Widely Publicized and Sensational Cases.

"In a widely publicized or sensational case, on motion of any party or on its own motion, when the court deems it necessary, in order to preserve decorum and to maintain the integrity of the trial, the court will issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the court may deem appropriate for inclusion in such an order. Such special order may be addressed to some or all, but not limited to the following subjects:

(1) A proscription of extrajudicial statements by participants in the trial, including lawyers, parties, witnesses, jurors, and court officials, which might divulge prejudicial matter not of public record in the case.

(2) Specific directives regarding the clearing of entrances to and hallways in the courthouse and respecting the management of the jury and witnesses during the course of the trial to avoid their mingling with or being in the proximity of reporters, photographers, parties, lawyers, and others, both in entering and leaving the courtroom and courthouse, and during recesses in the trial.

(3) A specific direction that the jurors refrain from reading, listening to, or watching news reports concerning the case, and that they similarly refrain from discussing the case with anyone during the trial

and from communicating with others in any manner during their deliberations.

(4) Sequestration of the jury on motion of any party or the court, without disclosure of the identity of the movant.

(5) Direction that the names and addresses of the jurors or prospective jurors not be publicly released except as required by statute, and that no photograph be taken or sketch made of any juror within the environs of the court.

(6) Insulation of witnesses from news interviews during the trial period.

(7) Specific provisions regarding the seating of spectators and representatives of news media."

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether in the federal system a district court judge has the power to deny *pro hac vice* admission to a member in good standing at the federal bar in his home state?

2. Whether the trial court had the power to deny to the defendant counsel of his choice, by denying *pro hac vice* admission to his attorney, where the record is clear that the asserted grounds for such denial, namely, a) a possibility of delays in future proceedings, and b) a claimed violation of court rules regarding communications to the media, are unfounded?

3. Whether a trial court has the power to deny to a defendant counsel of his choice, by denying *pro hac vice* admission to his attorney, because of a trial judge's disagreement with some of the views on controversial issues of said counsel and the trial court's asserted opinion that such representation would inure to the detriment of the said defendant, where the defendant is fully apprised of his counsel's views and makes it entirely

clear that, knowing such views, he still wishes to be represented by the said attorney?

4. May a criminal defendant be denied counsel of his choice because his attorney at a public meeting invited his audience to attend the trial?

5. Has the defendant in this case been denied a speedy trial?

If the case is not resolved upon the foregoing questions and the Court considers the so-called Fair Trial-Free Press issue, then we would suggest the following additional questions:

6. Whether court rules adopted to regulate public statements by counsel may be enforced by means other than the discipline of counsel, and specifically whether thay may be enforced in this case in such manner as to deny to defendant the right to counsel of his choice where it is clear that the facts would not have supported disciplinary sanction against counsel and where it is also not established that denial to defendant of counsel of his choice was necessary to control counsel's future conduct?

7. Assuming that under any circumstances, counsel for a defendant may be restricted in the exercise of his First Amendment rights in so far as concerns comments about a pending criminal case, may such a restriction be imposed by a blanket rule applicable to all litigation, not tailored to particular needs and without any determination that the application of such a rule in a particular case is in fact demonstrably necessary in order to avoid interference with a fair trial or other prejudice to the orderly or fair administration of justice?

8. Assuming the answer to the foregoing question is in the affirmative, whether Rule 27 of the United States District Court for the Southern District of Indiana is not unconstitutional on its face and as applied, in that:

(a) The rule restricts First Amendment expressions too broadly and there are available less drastic means to achieve the necessary ends?

(b) The rule employs an impermissible standard for regulating speech, *i.e.*, a "reasonable likelihood" instead of a "clear and imminent threat" to fair and orderly administration of justice?

(c) A defendant's counsel may not, under the First and Fifth Amendments, validly be barred from making public statements, particularly where enforcement officers and others connected with the prosecution are free to make public statements which may color media perception of the case?

COUNTER-STATEMENT OF THE CASE

Respondent's incarceration and the background of the charges against him.

Respondent, a 26-year old Black actor and playwright, was sentenced to a term of five years for draft refusal after being denied conscientious objector status.[2] The

[2] Respondent's affidavit filed in the Court of Appeals for the Seventh Circuit on September 6, 1973, in opposition to Petition for Rehearing (hereinafter designated "Respondent's Affidavit"), p. 2; see also, testimony before Judge Holder taken on April 1, 1973 (hereinafter designated "Tr.") pp. 108-109.

Respondent has lodged with the Clerk of the Court ten xerox copies of papers fastened together, containing (1) the stenographic transcript of all hearings before the district court, (2) the Petition for Mandamus, and (3) the motion for discovery which the court had said would be considered on April 1 and which was an exhibit attached to the Mandamus Petition. Respondent believes each member of the Court will wish to examine the proceedings and exhibits above enumerated and accordingly has made these xerox copies available for the convenience of the Court. They will hereafter be referred to as the "lodged papers." A copy of the lodged papers has been forwarded to the adversary counsel. All the foregoing documents are in the record filed with the Court.

penalty was the maximum allowable by law and was far in excess of that commonly given at the time Respondent was sentenced.[3]

When he was first imprisoned on November 10, 1971, the Respondent was placed in the federal correction institution at Danbury, Connecticut, a medium security institution. Thereafter, on July 3, 1972, Respondent was transferred to the federal prison at Terre Haute, Indiana, a maximum security institution.[4]

In that institution an incident occurred on August 22, 1972, which has been described in a document introduced by the Government in the lower court as follows:

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[3]At the time Respondent received his five-year sentence, October, 1968, the average sentence for draft refusal was 36.3 months and each year thereafter it has been reduced so that for fiscal year ending in 1972 the average sentence was 22.1 months. See Annual Reports, Administrative Office, U.S. Courts, on Federal Offenders. Selective Service Law Reporter, p. 6029.

The incongruity of the government's treatment of Mr. Banks is revealed in the fact that "[i]ronically, while one arm of the Federal Government has Burghardt [Banks] locked up, another, The National Endowment For The Arts, has granted him $7,000 to work on a movie on Frederick Douglass. Burghardt is trying to write the screenplay in prison. But as Burghardt himself said to one of his defense attorneys, 'They are killing me.'" See Exhibit D, excerpt from *Time* magazine, February 26, 1973, introduced by the government at the April 1 hearing before Judge Holder. See exhibits appended to this brief.

Respondent was awarded a $7500 matching grant from The National Endowment For The Arts for the foregoing purpose, and it has so far been held by the Cultural Council Foundation of New York pending his release from prison.

[4]The only statement in the record as to the reasons for this transfer appears in the *Time* article referred to *supra*, n. 3; apparently it was contended that Mr. Banks "helped lead a strike against inmate working conditions," so he was put in solitary confinement for five months and then transferred to Terre Haute, Indiana.

"A fight broke out in the prison yard between two inmates, one black and one white. When the prison guards broke up the fight, they led only the black inmate away to be disciplined. A crowd of 200 blacks gathered to protest, Burghardt among them. Later that evening he was summoned to the warden's office and refused to go. Guards used chemical spray and rubber truncheons to subdue him, then took him to solitary. Three guards were injured in the fight. Two of these 'assaults' were handled administratively; for the third, Burghardt now faces another trial, probably in April or May, and a possible additional sentence of three years."[5]

It was during the course of the transfer of Respondent from his cell to the "punitive segregation unit"—solitary confinement—that the alleged assult of the guard occurred. Mr. Banks states that as a result of this incident, he was "stripped naked and needlessly thrown by guards" into a strip cell on "punitive segregation G." (Respondent's affidavit, p. 4.) Respondent remained in solitary confinement in Terre Haute from August 22, 1972 until November 12, 1973, when he was finally moved to Sandstone, Minnesota.[6]

The indictment and events up to April 1, 1972, including pretrial proceedings.

On December 17, 1972, almost four months after the alleged incident, Respondent was indicted for assault and battery against a guard, allegedly committed in the course

[5] *Time* article, *supra*, n. 3.

This obviously is not the time or place for Respondent to state his view of the incident, and Respondent in no way accepts the characterization in the *Time* article or the charges against him.

[6] Respondent had two intermediate stays at Sandstone, namely, April 3 to May 3, 1973 and June 18 to June 23, 1973.

of the August 22 incident. The trial on the one-paragraph indictment[7] is the source of the issues which thereafter developed.

As soon as Respondent was given an opportunity to communicate from solitary confinement with the outside world, he wrote to his friend, Denise Spalding, and through her ten days later (September 2) received a visit from one Morris B. Blumberg, an attorney from Terre Haute (Respondent's affidavit, p. 4). Even before that, however, he was interviewed by the F.B.I. (*id.* at 5). On September 6 and 13, Respondent received a "Good Time Forfeiture Hearing" at which he was denied counsel or an opportunity to call witnesses, and as a result, all his good time was forfeited (*id.* at pp. 7-8).

Respondent, who had been warned by prison authorities that an indictment "most likely" would be forthcoming (*id.* at pp. 10, *et seq.*), was receiving counsel from Mr. Blumberg until he became involved "almost continually" in another case in Florida (*id.* at p. 13). During the Fall, after he had been warned of the impending indictment, Respondent asked Ms. Spalding to seek out Mr. Kunstler, who expressed interest but was then otherwise engaged and could not commit himself; besides, there was no indictment at the time (*ibid.*)

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[7] "The Grand Jury charges that:

"On or about the 22nd day of August, 1972, at the United States Penitentiary, Terre Haute, Indiana, in the Southern District of Indiana, ARTHUR C. BANKS, did forcibly assault, resist, oppose, impede, intimidate and interfere with Harold J. Roberts, a Safety Officer of the Federal Bureau of Prisons, employed at said penal and correctional institution, while said Harold J. Roberts was engaged in the performance of his official duties.

"All in violation of Title 18, United States Code, Section 111."

On December 17, Respondent was indicted. On December 20, he was taken out of solitary confinement to a night-time arraignment before Petitioner (Tr. 2) and advised the court that Mr. Blumberg and Mr. Kunstler were his counsel and that Mr. Blumberg was in Florida and Mr. Kunstler on the East Coast (*id.* at 4). Mr. Banks designated Mr. Blumberg as his "chief counsel in this case" (*ibid.*) whom he had retained and paid a fee (*id.* at 6). Despite Respondent's mention of Mr. Kunstler as having been his lawyer on December 20, subordinate to Mr. Blumberg, it is beyond dispute that Mr. Kunstler had not at the time finalized any agreement to represent Respondent, as indeed he could hardly have been expected to do until February 9 when Mr. Kunstler met Mr. Banks for the first time in the penitentiary (*id.* at 110). The mention of Mr. Kunstler's name, however, evoked the following comment from the Petitioner: "Mr. Clerk, have you heard from Mr. Kunstler, this world traveler?" (*id.* at 5.) At the arraignment, the clerk mentioned that he had heard from a Mr. Barnhart, who said he had heard from "friends of Mr. Banks" and that he was to be Respondent's lawyer. Respondent advised the court that he did not know Mr. Barnhart and had paid Mr. Blumberg (*id.* at 8-9).

The court entertained and granted Respondent's oral motion for continuance, to which the government raised no objection, and continued the arraignment "indefinitely".

On January 2, Respondent was again taken in for arraignment. Mr. Brent Barnhart entered an appearance as local counsel for Mr. Banks and explained that "He [Respondent] has expressed to me a desire to have another counsel as chief counsel or counsel to handle the trial and prosecution of this case" (*id.* at 14). Mr. Barnhart explained that he had been contacted and hired

by Mr. Banks' family and did not feel "competent at this time to proceed as trial counsel" (*ibid.*). The court continued the arraignment and, while admonishing Mr. Banks and Mr. Barnhart to be fully represented at the next hearing, did not act on Mr. Barnhart's request to establish a date certain for the next arraignment (*id.* at 15).

An arraignment was again scheduled for February 2. Mr. Barnhart was present and explained that "Mr. Kunstler is . . . trial counsel Mr. Banks has chosen" and he wished to be there for the arraignment (*id.* at 19). The court rejected any plea for further postponement of the arraignment and entered a plea of not guilty and an order for pretrial discovery (*id.* at 19-20). The court indicated that the case "would be set for trial by the Judge who comes here in May" (*id.* at 19).

On February 12, Mr. Barnhart, on behalf of Mr. Banks, filed motions for a bill of particulars and for discovery and inspection (*id.* at 189). On February 14, the government moved to advance the trial of this case to an early date, no specific date being suggested (*id.* at 191). On February 15, the court responded with a letter to the U.S. Attorney indicating that the time for trial was not then "predictable" since the "discovery and inspection phase of the action has just commenced on February 12, 1973." On March 5, the government filed a motion to strike defendant's motions for a bill of particulars and for discovery and inspection.[8]

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[8]The motion to strike was based on the unusual assertion that it had been signed by "local counsel" and that Mr. Banks had said that Mr. Kunstler would be his "trial counsel" and that for some unexplained reason that fact put the government in a position of being "unable to effectively respond to the pleadings of his local counsel, and particularly, to effectively entertain any discussion of the requested information." As will later appear, Mr. Kunstler's

It will be observed that prior to March 15, Mr. Kunstler's name had been mentioned in court only in terms of his ultimate handling of the trial and his wish to be present at arraignment. While the arraignment might have been slightly delayed, Mr. Barnhart was proceeding with all deliberate speed to represent the Respondent's interest in the pretrial proceedings. Up to March 15, the court had not set a date for a hearing on the pretrial issues and of course had not set a date for the trial, and there was nothing to indicate that retention of Mr. Kunstler would cause delay in the trial. The motions filed by Mr. Barnhart, however, gave a clue to the vigor of the defense which would be presented. The discovery motion, in particular, which had been filed by Mr. Barnhart after consultation with Mr. Kunstler, gave ample demonstration, by the kinds of evidence it was searching out, that defendant and his counsel were mounting a major defense which would involve and reveal a great deal about the inner workings of the Terre Haute penal institution (see Exhibit C to Petition for Mandamus, included with lodged papers).

On March 15, the government filed a motion for the appointment of trial counsel. On March 21, Mr. Kunstler's motion for leave to appear as counsel and notice of appearance were filed.[9] On the same day, the government

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status as counsel was not finally resolved until February 9 and he had not as of February 12 even filed his motion for leave to appear, and hence could not have signed these pretrial motions. In any event, no one on the defense side had ever indicated any limitations on Mr. Barnhart's authority to handle pretrial matters.

[9]Mr. Kunstler had understandably not finally accepted Mr. Banks' request that he represent him until February 9, the first day he had been able to confer with him (Tr. 109). Mr. Kunstler prepared a notice of appearance, dated February 27, and forwarded it to Mr. Barnhart for filing. For some unexplained reason, it was not filed until March 21 (*id.* at 76-77).

moved for a hearing on Mr. Kunstler's motion (Tr. 198). The government's motion gave no clue as to what, if any, issues would be raised in respect to Mr. Kunstler's application for *pro hac vice* admission.

On March 23, the clerk prepared an order fixing a hearing for Friday, March 30, on all the foregoing pretrial motions, *i.e.*, bill of particulars, discovery, and the government's motion to appoint counsel (*id.* at 200). Earlier, the trial judge had indicated to the clerk that the case would be tried on the May 1973 calendar (*id.* at 199).

Neither Mr. Kunstler nor Mr. Barnhart could make the March 30 date because of prior commitments, and by telephone communication with the clerk asked if the court could move the hearing "to the 2nd or 3rd of April [Monday or Tuesday] or any time the first part of April" (*id.* at 203). The court in response continued the hearing to Saturday, March 31 (*id.* at 205). That date, too, presented calendaring problems, and on March 29 Mr. Allison (Mr. Barnhart's partner) presented a motion for continuance, explaining in detail why the March 31 date was not possible and the short notice that had been received (*id.* at 32). He suggested that if the court could not continue the matter until April 2 or 3, it might set the hearing for Sunday, April 1. The court adopted the suggestion (*id.* at 71), but not until it had made a 36-page statement (*id.* at 35-71) which alleged the existence of statements in the record which are in fact not there.[10]

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[10]At Tr. 40, Petitioner quotes Respondent as saying at his first arraignment in December 1972, "I don't want this lawyer, and I have a lawyer, and his name is William Kunstler." And see Petitioner's repetition of this statement at Tr. 64. No such statement appears in the record. Rather, the record shows that Respondent stated that he had hired Mr. Blumberg as his chief

The government opposed the motion because "we must, as a matter of record, strenuously object to any further delay which would deprive the defendant Banks of counsel for even twenty-four hours" (*id.* at 31).

It will be observed that the court had indicated to the clerk that it intended to try the case in May. There was no suggestion whatever that Mr. Kunstler would not be in a position to try it then. Nor was there any suggestion that Mr. Kunstler, with Mr. Barnhart, was not fully prepared to deal with the pretrial discovery issues set for consideration on April 1 or complete pretrial discovery

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counsel and had paid him a fee and that Mr. Kunstler was also retained (see p. 9, *supra*).

At Tr. 45, Petitioner referred to Mr. Barnhart "whom we have been advised personally on the record, who personally himself, Mr. Banks, says is not his lawyer, except he regards him as a very secondary capacity, as playing second base." Petitioner's characterization of Mr. Barnhart is not found in the record (see Tr. 14). When Mr. Allison, in response to the judge's comment about Mr. Barnhart, asked, "Your Honor, is it a rule of the local Court that local counsel may not sign pleadings for trial counsel?", the court responded: "Did you hear what I just said? You follow me, because you are already resisting, opposing what I am trying to get across to you." (*Id.* at 45.)

Again, there is the Petitioner's statement at Tr. 62:

> "Let me put the English on it, here, the big casino now: Can you tell me why—can you tell me why, Mr. Barnhart—I mean Mr. Allison—Mr. Kunstler didn't enter his appearance long before this date—or make application for it—the 21st of March."

And Petitioner, never having met Mr. Kunstler or given him any opportunity to explain, proceeded by posing rhetorical questions to draw some unsupported inferences:

> "Why couldn't he enter an appearance? Did he want to make these speeches without having any obligations as counsel of record? Or was he afraid of the Free Press Fair Trial Rules of the—where he couldn't make speeches about his client when he had an appearance on file, or something like that?"

matters thereafter. In fact, Mr. Allison, in response to an inquiry from the judge, assured the judge that Mr. Kunstler and Mr. Barnhart would be prepared to argue all the motions set for the hearing (*id.* at 67).

At the hearing on March 29, when Mr. Allison appeared to request a rescheduling of the hearing day, the judge and the U.S. Attorney, though obviously not required to do so, and though they had never met Mr. Kunstler, made some extended remarks which were reported in the local press, to some extent inaccurately. Mr. Kunstler referred to a newspaper report of these remarks at the April 1 hearing (*id.* at 81 *et seq.*), the transcript not then being available. Mr. Kunstler's comments are dealt with below.

The April 1 hearing.

Mr. Kunstler presented himself to the court and set forth his credentials, including the fact that he has been a member of the bar of the State of New York since 1948, has practiced before many federal and state courts, had never been disciplined in any court of the United States (noting that a contempt conviction in Chicago had been reversed), had been an assistant professor of law at New York Law School and written for law journals, and that his professional experience includes practically every kind of criminal case ranging from disorderly conduct charges to murder (*id.* at 76-79). His statement was supported by an affidavit.

At this point, Mr. Kunstler referred to the newspaper report of the hearing on the preceding Thursday. The comments which Mr. Kunstler referred to were that:

a) Mr. Kunstler was apparently more concerned in "making speeches than in representing the defendant" (*id.* at 81). Mr. Kunstler denied this, and indicated that it should not have been said out of his presence, and had a serious effect on the defendant in that "it can serve to

prejudice this defendant in the eyes of the potential jury that may hear this case" (*id.* at 83).

b) The judge was not concerned with Mr. Kunstler's "show business," which Mr. Kunstler indicated was "unfair to this defendant." Apparently this reference was to the fact that Mr. Kunstler was addressing two law schools (*ibid.*).

c) That Mr. Banks was "number forty-nine on my list of cases" (*id.* at 84), which Mr. Kunstler said was "totally untrue."

d) The judge also said that Mr. Kunstler "was a world traveler, trying to solve the problems of the world and that the defendant was secondary." (*id.* at 85-86.) Mr. Kunstler denied this and added:

> "I don't think remarks like this add much to the cause of justice, or any way help him, but in fact hurt him." (*id.* at 86.)

Mr. Kunstler further stated to Petitioner:

> "I want very seriously to represent Arthur Banks in this case. . . He has requested me and Mr. Barnhart to represent him. I gave it serious consideration, and even came out here to interview him prior to even saying that I would consider it.
>
> "I want to do that . . . I thought I had followed the law in filing or sending out a notice of appearance. I have been working on the case since that time.
>
> "The scheduling of trial I think will have to at least be done with some view to other engagements of mine that might in some way come a little bit before this case. They are not forty-eight in number in any manner of means. Many of those forty-eight are not even trial cases; some of them are one-day hearings here, one-day hearings there. . .
>
> "Arthur Banks is perfectly willing to waive any speedy trial claims he might have in this case. He is perfectly willing to waive all benefits that may

accrue to him on motion practice via rules of this District Court. He has expressed a strong feeling that I represent him, along with Mr. Barnhart, both as trial counsel—not just as a local counsel and a visiting attorney, but as two equal trial counsel in this case. . .

"I am ready to try this case." (*Id.* at 90-92)

Mr. Miller for the government recounted the facts with respect to the arraignment, as set forth above, and corrected errors in the newspaper article referred to by Mr. Kunstler,[11] describing the March 29 hearing. The article mistakenly attributed to the judge the first two of the comments noted above (*supra*, p. 15). Mr. Miller quite properly pointed out that *he*, not the judge, had made those statements (Tr. at 98-99).

Mr. Miller then proceeded as follows:

"We don't know whether Mr. Banks under the circumstances of this case, wants Mr. Kunstler to represent him . . . We don't know if Mr. Banks still wants Mr. Kunstler. We don't know whether Mr. Banks would want this case to proceed if someone else handled the discovery besides Mr. Kunstler." (*Id.* at 99-100.)

Following that, Mr. Miller stated that Mr. Kunstler had appeared at a "press conference in Indianapolis on February 9, 1973 at which time he did not appear formally in this case and an article appeared in the paper concerning statements that Mr. Kunstler made." This article, under John Bancroft's name, had appeared on

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[11]Mr. Kunstler had carefully explained that, "I am only going by newspaper clippings and Your Honor will correct me if I am wrong" (Tr. 81) and "I hate to use the newspaper, because I haven't read the record here, but it's all I have" (*id.* at 85).

page 31 of *The Indianapolis Star* on February 10. It was the subject of detailed testimony below.

Mr. Miller for the government put the issue thus:

> "Now here again, as we know, in a jury trial the jurors are among those who are seated in the courtroom. I have stated before, and I will state again, that we are concerned about a fair trial for the defendant . . . Is it possible to have a fair trial when the jury is alienated towards trial counsel? Does Mr. Banks, who is here in person, want Mr. Kunstler to represent him, if he is going to suggest to the media that there might be some sort of reaction which would intimidate jurors and alienate them to Mr. Banks and to Mr. Kunstler?
>
> "These are the questions which I believe should be answered today. And *the only question, of course, is providing Mr. Banks with a fair trial.*" (Tr. 101-102; emphasis added.)

There was never any proof that Mr. Kunstler had attended a press conference in Indianapolis on February 9; the proof was that he had spoken to a lone reporter who sought him out at a cocktail reception (see p. 20, *infra*).

In any event, in response to the statements attributed to him on February 9, Mr. Kunstler said:

> "But in any event, I don't think that that statement is actually relevant to my ability to serve here. I have a right to make First Amendment statements. I made this. I was not in the case at the time I made it, but I think I would have the right to make it if I were in the case. I think that's irrelevant, whether I had filed or had not filed, under the Seventh Circuit opinion, unless we have a hearing and Your Honor finds after that hearing, specifically, that there was a serious and imminent threat to the administration of justice.

"If Your Honor finds that, then we have an issue we can treat in the appellate courts and at least you have followed the Seventh Circuit's admonition." (Tr. 105-106)[12]

Mr. Banks, who had been in court during the entire argument, then took the stand (*id.* at 109-27), reiterated his firm insistence that he wished Mr. Kunstler to be his trial counsel (*id.* at 112), and expressly waived any speedy trial objection in the event a problem of "conflicting schedule" caused any delays (*id.* at 111). In response to a question on cross-examination, he even indicated a willingness to accept a possible delay from May until September (*id.* at 118), although there was nothing in the record indicating that Mr. Kunstler would not be able to try the case in May. Mr. Banks also made

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[12]Earlier Mr. Kunstler expounded in more detail his understanding of the law as enunciated in *Chase v. Robson*, 435 F.2d 1059 (7th Cir., 1970):

"I think that Chase versus Robson is the law in the Seventh Circuit, in which this Court sits, and I intend to be guided by Chase v. Robson in this case. I think that Your Honor is bound by it, as we are bound by it, and that any press restraints in this case must contain a clear, specific finding, following a hearing, that there is a 'clear and imminent threat to the administration of justice' before they are Constitutionally valid.

"So my filing or not filing a notice of appearance had nothing to do with it. I would have said the same thing I said—or may say in the future—whether I had filed a notice or had not filed a notice, because I had in mind and will continue to have in mind what the Seventh Circuit has told me is the law in this respect.

"Your Honor indicated—or the papers say that Your Honor indicated—that maybe I didn't file because I was attempting to avoid restrictions placed on attorneys about what they may say in public about a case. That is totally untrue. I respect the Seventh Circuit, and will totally live up to its mandate in Chase versus Robson." (Tr. 88-89)

clear that he would accept the fact, if it so developed, that Mr. Barnhart might be "the only one who physically participates in the discovery proceedings" (*id.* at 117).

The final questions and answers on cross-examination were as follows:

> "Q Well, then there's nothing you have heard here today which would change your mind about Mr. Kunstler's representation of you?
>
> A No, sir.
>
> Q Nothing about his methods or his opinions?
>
> A His qualifications, his methods, or his opinions are consonant with mine." (Tr. 126-27)

The government then put on its evidence, which consisted exclusively of the following:

1. John Bancroft, a reporter for *The Indianapolis Star* (*id.* at 128), who testified that he had interviewed Mr. Kunstler at the law office of Allison & Barnhart on February 9, 1973, and as a result wrote an article that appeared the following day on page 31 of the *Star*. This article, which was marked in evidence as Exhibit A (Tr. 133), is reproduced in full at the end of this brief. Rather than attempting to summarize the contents of the four exhibits included in the trial, we have set all of them forth in full as exhibits to the brief so that the Court may most conveniently read them in full.

Mr. Bancroft readily acknowledged that he had not been at the "Third World Student Conference" (a meeting of high school students addressed by Mr. Kunstler, see *infra*, p. 64) so that statements attributed to Mr. Kunstler's appearance there were hearsay (id. at 132). Mr. Bancroft explained that the occasion of the interview was a reception with Indianapolis lawyers where he had sought out Mr. Kunstler and asked him for an interview (*id.* at 135), that Mr. Kunstler did not seek the interview ("I [Kunstler] didn't go looking for you; you looked for

me" [*id.* at 143]), that the interview was an accurate summary of Mr. Kunstler's statements and that his reference to "blowing up the court" was a "facetious remark" (*id.* at 142) in explanation of the fact that while Mr. Kunstler wished the third world students to support the case and to draw attention to the trial, he was making clear that he wished conduct which was not violent (*ibid.*).

On cross-examination by Mr. Kunstler, Mr. Bancroft made absolutely clear that Mr. Kunstler in no way sought to have Mr. Bancroft print the story: "It was my city editor's idea," and the interview happened at a cocktail party where there were no other reporters present (*id.* at 144-45).

No proof was offered as to the circulation of *The Indianapolis Star* in Terre Haute, nor was there any testimony that anybody in Terre Haute had seen Mr. Bancroft's article. The Court should know that Terre Haute is 95 miles from Indianapolis, that the two cities are in different divisions of the Sourthern District of Indiana, and of course have separate jury rolls.[13]

2. The government also offered in evidence what appears to be a press release issued by the "National Committee to Free Arthur Burghardt Banks." This

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[13]28 U.S.C., Sec. 94, establishes the following four divisions for the Southern District of Indiana: Indianapolis, Terre Haute, Evansville, and New Albany. Consistent with the provisions of 28 U.S.C., Sec. 1861 *et seq.*, a jury plan has been put into effect for the United States District Court for the Southern District of Indiana providing for separate jury rolls for each of the divisions. See Section 7 of the plan for the random selection of grand and petit jurors, pursuant to the Jury Selection and Service Act of 1968, approved August 5, 1968.

statement, identified[14] in the record as Exhibit B, is reproduced in full among the exhibits appended to this brief. It has a dateline of February 9 and includes certain comments by Mr. Kunstler about Mr. Banks. No proof was offered as to 1) who received the press release, 2) whether it resulted in any publicity, 3) when Mr. Kunstler made the quoted statement, to whom, or whether he had authorized inclusion of his statement in the press release, or 4) whether the press release was issued in New York, which is apparently the location of the Banks Committee, in Terre Haute, or any other place.

The manner in which this item came into the record is of particular interest:

> "MR. MILLER: Your Honor, earlier this morning you referred to an affidavit filed by Mr. Kunstler, relating to some of the information that he had given at a press conference.
>
> THE COURT: Yes, sir?
>
> MR. MILLER: I would like that to be identified, and the Court take judicial notice of that as part–
>
> THE COURT: This is the April 1st affidavit or–that's the one that was filed this morning? Is that what you are referring to?
>
> MR. KUNSTLER: Only one I filed, Your Honor.

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[14]Although, as appears above, Exhibit A was formally introduced in evidence, Exhibits B, C, and D were merely marked for identification and there does not appear to have been a formal admission of them into evidence. Nevertheless, Exhibits A, B and C (but not D) bear an indication that they were placed in evidence.

All the foregoing exhibits were annexed to the answer to the Petition for Writ of Mandamus filed in the Seventh Circuit by Judge Holder, and they are set forth in their full text at the end of this brief.

THE COURT: *Are you referring to this publicity statement from that meeting? There's quotes in there from him.*

MR. MILLER: Yes. This publicity–I am not sure where this came from, Your Honor.

THE COURT: Well, the press handed the Court a copy of it. That's a Xerox copy of it." (Tr. 147)

The foregoing *concluded* the government's evidence (Tr. 150) until the judge offered additional material, beyond Exhibit B already referred to, to government counsel:

3. The court handed government counsel a copy of a newscast from WTWO, a Terre Haute television station, which attributed certain statements to Mr. Kunstler. Government counsel promptly offered it in evidence (*id.* at 151) and it was identified[15] over objection (*id.* at 160). This exhibit is reproduced at the end of this brief, with the other three exhibits. The newscast contains no formal quotation or statement from Mr. Kunstler. It refers to the fact that Mr. Kunstler had spoken to a Black division of a student organization on behalf of his client, Mr. Banks. It does not indicate that Mr. Kunstler in any way discussed the charges against Respondent or any of the items referred to in Rule 27. The newscaster reported that Mr. Kunstler had expressed the opinion that the only successful way to defend oneself against charges such as those facing Mr. Banks was to create a support group around the trial, including demonstrations, making sure that every court session has a full house. The commentator also said that Mr. Kunstler had a comment concerning draft evaders and the granting of amnesty, but did not say what that comment was.

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[15] See footnote 14, *supra*, p. 22.

4. Lastly, the government, again over objection, marked for identification[16] as Exhibit D (*id.* at 163) an article from the February 26, 1973, issue of *Time* because Mr. Kunstler is quoted there as saying: "The moment he [Banks] went into prison he was doomed." In no other way is Mr. Kunstler quoted there, nor does he mention the indictment at all. There is no evidence as to when and to whom Mr. Kunstler made the quoted statement and whether he authorized its use by *Time*. This exhibit is also appended to this brief.

Neither the government nor Judge Holder mentioned that the same article in *Time* includes the following paragraph quoting the Director of the Federal Bureau of Prisons:

> "Federal officials express surprise at the attention Burghardt's case is receiving. He was 'identified as a ringleader,' says Norman Carlson, director of the Federal Bureau of Prison, 'and when the officers attempted to place him in segregation, he attempted to agitate other inmates in his behalf.' "

5. Next the court mentioned a memorandum from the judge's secretary indicating that she had received inquiries concerning when the *Banks* case was to be tried (*id.* at 166). Petitioner asked Mr. Kunstler whether he would stipulate the facts as to what appeared in the memorandum. Mr. Kunstler refused (*id.* at 166) and the secretary was never called as a witness.

The court then, calling attention to the fact that the news broadcast (Exhibit C for identification) had included in the statement, "And Kunstler had a comment concerning draft evaders and granting amnesty" (Tr. 170), pressed Mr. Kunstler, as follows:

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[16]See footnote 14, *supra*, p. 22.

"THE COURT: What did you say to the public via these radio and television newscasts pertaining to what is referred to, here, by this commentator: 'And Kunstler had a comment concerning draft evaders and granting of amnesty.' What do you say about that?"

Mr. Kunstler, while objecting to the inquiry, did his best to respond to the question as follows:

"MR. KUNSTLER: Well, Your Honor, I am going to answer that question, but I really don't think it's pertinent or justified in this inquiry.

I don't know exactly if I was asked a question about draft evaders and the granting of amnesty. What I would–did say–I'll tell you my feelings, and probably–

THE COURT: Would you include in that what you said about prisoners of war about that time?

MR. KUNSTLER: I don't remember that I said anything about prisoners of war.

It says here: 'Kunstler had a comment concerning the draft evaders and the granting of amnesty' and–

THE COURT: That was this commentator. I am talking about the rest of them in this area. What did you communicate to them about prisoners of war and–

MR. KUNSTLER: I really don't remember. I tell you what my general feelings are, if your Honor wants.

THE COURT: No, I want to know what you told them, to the–

MR. KUNSTLER: I can't remember.

I am in favor of amnesty, so I probably said that.

I also probably said that I think that people who avoided the draft on the grounds Mr. Banks did–

that this was an immoral, illegal, and unjustified war; that it was sheer murder—were I thought, true heroes of America; and that was what we wanted the German soldiers to do when Hitler ordered them to commit acts of aggression.

And I probably said something like that. I don't remember whether I said anything about prisoners of war, whom I think are also victims of that war, every bit as much as Arthur Banks is a victim of the war.

I have the same essential feelings about POW's as I have about Arthur Banks. He is also a POW, as they were, held by a different Government: He for refusing to do what everyone now agrees was wrong, and they for being forced to do what everyone now agrees was wrong. So I feel a common bond between them. So I thought if—and I thought that if I said anything about POW's, I thought their release should certainly militate his release as well."

Thereafter the court, in the presence of the defendant—and of course the press since this was in open court—engaged in the following colloquy with Mr. Kunstler and Mr. Banks:

"THE COURT: What effect do you [Mr. Kunstler] think that will have on the jury, and the public generally, of your feelings about that in defending an assault and battery case of your client?

MR. KUNSTLER: I have no idea.

THE COURT: Now, do you think you should visit those opinions, and those causes that you promote—right or wrong—and have your client carry that on his back in an assault and battery case?

MR. KUNSTLER: Well, he's carrying nothing on his back. Some people might agree wholeheartedly with what I say. Other people might oppose it. My political views are well known throughout the United States.

I might indicate that, since Chicago, all the cases that I have tried, I have been successful with one exception: A murder case in which a defendant had a confession which went into the record.

Jurors in the South, Norfolk Virginia, New York, Midwest.

I trust jurors; more, maybe, than the Court does. I, very well understand, that the lawyers–

THE COURT: I am always looking–let me repeat my example–I am always looking down the road, after trial: What is the defendant going to say then?

MR. KUNSTLER He is here–

THE COURT: What is he going to say then, if he is convicted, and he feels that, 'My lawyer, I carried his marbles into this game'?

MR. KUNSTLER: He is here, Your Honor; he can speak, himself.

I would ask Your Honor to permit the defendant to say what he thinks on that.

THE COURT: All right, go ahead. Yes, sir?

DEFENDANT BANKS: Your Honor, I feel impelled to say something here at this point: I have no illusions whatsoever about my standing in this community, or in any white community in this country. I am Black; that's partially enough to get me behind the eight ball, as far as that is concerned. I am a convict, Your Honor; I am deemed a criminal by this society, and I am incarcerated in a penitentiary. That is another thing that I have to my detriment.

I have no illusions about what a jury may–

THE COURT: Counsel, would you ask your witness questions on the point that we were–

MR. KUNSTLER: I thought Your Honor wanted the statement, but–

THE COURT: You asked to produce your your client here as a witness on the point of: Would he forgive you for your carrying *a monkey on your back*, here, about the other causes we are talking about. [Emphasis supplied.]

DEFENDANT BANKS: I have carried many monkeys on my back, Your Honor; I forgive him his.

THE COURT: That was the point of your calling him. Now call him and ask him questions about your causes that you carry, that may be visited upon your client. You understand what I am talking about.

MR. KUNSTLER: May I put him on the stand, then?

THE COURT: All right, sir.

MR. KUNSTLER: He's still sworn, Your Honor, from his previous testimony.

ARTHUR NAPIER BURGHARDT, charged in the Indictment as ARTHUR CHESTER BANKS, III, called as a witness by the applicant, having been previously sworn to tell the truth, testified further as follows:

DIRECT EXAMINATION CONTINUING. QUESTIONS BY MR. KUNSTLER:

Q Mr. Banks, you have heard the Judge refer to the causes which I espouse or support, and he's used the term, 'a monkey on your back,' and so on. I would just like to ask you if, after knowing of my political and ethical and moral convictions, and knowing that they have been publicized here and in many other places in the United States, would that in any way make you want to change your mind about retaining me as your attorney?

A No, sir. Your beliefs are your own.

MR. KUNSTLER: I would hope, Your Honor, that jurors would understand that as well, my beliefs are my own. Thank you, Mr. Banks.

(WITNESS EXCUSED)." (Tr. 170-76)

The foregoing is the entire record of evidence in the April 1 hearing.

At page 179 of the transcript the court began a statement which, with minor interruptions, continued until page 216 and included a detailed statement of the dates and problems of resolving pretrial matters. At page 216, the court started quoting Rule 27 with respect to publicity by counsel, and there then (at Tr. 222) occurred another extended colloquy, this time between the court and Mr. Allison (Mr. Barnhart's partner), in which Mr. Kunstler and finally Mr. Banks, joined:

"THE COURT: Did you see any communication in the press that this case was being funded in part by the Angela Davis Fund, defense fund?

MR. ALLISON: In the Indianapolis press, Your Honor, or any press?

THE COURT: Yes, sir, any press, sir.

MR. ALLISON: Judge, I read a lot of material; I don't know what I read on this case in the Indianapolis newspapers. Do I specifically remember having read something about–

THE COURT: Would it refresh your recollection if I showed you one?

MR. ALLISON: Surely it would, Your Honor.

THE COURT: Let's see if we can find it. Here's a clipping from the Indianapolis News, Indianapolis, Indiana, February 21, 1973. Would you peruse that and see if that will remind you concerning Angela Davis funds supporting this case in part?

MR. ALLISON: It says, 'Government officials have a different version of the circumstances'–

THE COURT: Does that refresh your recollection, Mr. Allison?

MR. ALLISON: Yes, it does.

THE COURT: All right. What does it refresh your recollection about the Angela Davis Fund, sir?

MR. ALLISON: I remember reading this article, Your Honor, back in February some time. Let me see. That's it, Judge: Yes, I did.

THE COURT: And is it a fact, to your knowledge, that the Angela Davis Defense Fund is supporting this case?

MR. ALLISON: No, Judge, I wouldn't even know.

MR. KUNSTLER: Your Honor, I am going to object here. They are not, but I think in asking that question you are going beyond the bounds of propriety in the courtroom. They are not supporting this case that I know of, but you are asking a question that really is none of the Court's business whatsoever, who supports this case. If it was supported by–

And I bet you have never asked anybody in this courtroom before, who supported a case, anybody representing a private client in this courtroom. I don't think it's your business to go into that, Your Honor, with all due respect.

They are not supporting it; I will answer your question directly, because I think what you are trying to do is give a coloration of Communist support, or what you–

THE COURT: Wait a minute, I have not said–

MR. KUNSTLER: You brought the–

THE COURT: One at a time, please.

MR. KUNSTLER: You brought the clipping in here, and you are asking this young attorney whether he read it. He read it, he said; he said he

read it. Now you are asking him whether the Angela Davis Committee is supporting this case, and there can be only one intention behind that, Your Honor, with all due respect, and that is to prejudice this defendant.

MR. ALLISON: Your Honor, I already told you: I am not associated with this case.

MR. KUNSTLER: Your Honor, I am asking this young attorney not to answer any questions, as this man's attorney, because I think it's a deliberate prejudice of this man.

THE COURT: Which man's attorney are you?

MR. ALLISON: I am–

DEFENDANT BANKS: He is my attorney, Your Honor.

THE REPORTER: One at a time, please.

THE COURT: You are not attorney for this man here?

MR. KUNSTLER: No, Your Honor, but he is–

THE COURT: The connotation you just placed on this 'young attorney' the record should disclose that he is an experienced trial attorney, and has served four years in the State Legislature as a State Senate [sic], and he's no–

MR. KUNSTLER: He's a young attorney as far as my fifty-three years are concerned.

THE COURT: –no babe in the woods.

MR. KUNSTLER: But Your Honor, I just don't want my client's rights prejudiced by this sort of colloquy between you and Mr. Allison.

THE COURT: This reached the people, the subscribers of this paper in the Southern District of Indiana; and this is [sic] paper is what said it; I didn't say it.

MR. KUNSTLER: What's that to do with my qualifications? That is what I don't understand at all.

MR. ALLISON: Judge, it doesn t say anything in here that he said anything about this.

THE COURT: Well now, gentlemen, any time a man takes the witness stand and testifies, his credibility is at stake, Mr. Kunstler.

MR. KUNSTLER: Put me on the stand then, Your Honor.

THE COURT: Mr. Kunstler said he was hired by this man, Banks. Mr. Banks had told me that he had received—early in the stages, that his family had engaged Mr. Kunstler. Here's a public statement that refutes both of them.

DEFENDANT BANKS: Your Honor, I said before you that people in New York City—you know, one person particularly had spoken to Mr. Kunstler, and Mr. Kunstler had alerted me through this person that he would be definitely my attorney. That is exactly what I said, Your Honor.

And as far as the Angela Davis Committee giving any support whatsoever, I know of no monetary support; I don't believe there is any.

I am an actor, and I am a well-known actor, Your Honor, and what people say about me is of little consequence to me; a lot of things have been said before. And I give no credence to what a lot of newspaper articles have said about me in the past." (Tr. 222-27)

Following this, Mr. Kunstler made a motion to disqualify Judge Holder, and pointed out that the judge's comments, for which there was absolutely no foundation, would have the effect of giving a Communist coloration to the case and would gravely prejudice Mr. Banks. Mr. Kunstler's comments follow:

"So, Your Honor, I would like to move to disqualify you at this point from further consideration of this matter. I think this record is clear, that you are

prejudiced against this defendant—put aside his attorney—and you are using the power of your office to make a record here to indicate to the general public that he cannot get a fair trial; and you are, in effect, making it impossible for him to get a fair trial.

"If you blame me for my public remarks, what more public remarks could there be to hurt a defendant than to tell the people in Terre Haute, Indiana, he is supported by Angela Davis? Angela Davis might feel sympathetic to this case. I don't know what her feeling is about this case.

"But Your Honor knows, when the newspapers tomorrow print this, that there will be many people in Terre Haute who are going to say: 'Yes, supported by a Communist.' And you are going to have real problems now with jury selection.

"I think you have made it impossible to get a fair jury in Terre Haute by remarks such as that." (Tr. 229-30)

The court thereupon denied the application of Mr. Kunstler for leave to appear (*id.* at 246) and Mr. Banks stated, "Your Honor, I stand mute henceforth. I can't take this any more." (*Id.* at 249.)

Though the court had scheduled hearings on other pretrial matters and lengthy memoranda had been submitted dealing with discovery matters, it adjourned at the conclusion of the hearing.

It should thus be observed that the *whole* of the evidence upon which Judge Holder based his claim of a "pattern of pretrial publicity . . . by petitioning attorney" consisted of:

1) An interview sought by a lone newspaper reporter at a cocktail party of a group of lawyers, the report of the interview appearing at page 31 of a newspaper in a community 95 miles from the location of the trial and outside the area from which the jury would be drawn;

2) A talk to a group of high school students within the community with a statement that a case of this sort needed support around the trial, including demonstrations, with no suggestion that they should not be peaceful. The talk also included an invitation that the listeners come to court and make sure every court session is full. This talk produced a less than one-minute newscast by a television reporter, Mr. Kunstler not appearing thereon, which included references to opinions of Mr. Kunstler;

3) A press release by the committee supporting Mr. Banks, with no proof that it was distributed in the community or resulted in any publicity;

4) A one-sentence quotation in *Time* magazine, with no indication of when the statement was made or whether the quotation was authorized.

And although Judge Holder at one point said to Mr. Kunstler, "What did you say to the public via these radio and television broadcasts?", there was no proof of any radio or television broadcast by Mr. Kunstler; the television newscast was not by Mr. Kunstler, and in any event the statements repeated by the newscaster (if Mr. Kunstler was accurately quoted) were plainly not violative of Rule 27.

Events following April 1 and prior to the intervention of the Seventh Circuit.

By written order dated April 2, Judge Holder confirmed his order stated from the bench and included the following justification for his action:

> "When petitioning attorney's conduct in the subject cause is reviewed in its entirety, the impact this must have upon potential jurors in Terre Haute Division of the Court inevitably inures to the detriment of the *defendant* in the subject cause." (Emphasis supplied; Petition for Certification, p. 51.)

By further order dated the same day, Judge Holder designated one Bueno Chaney, a practicing attorney in Terre Haute who had previously been appointed to represent some inmates in the correctional institution (Tr. 268), as counsel for Mr. Banks. The latter refused to be represented by Mr. Chaney and the court at a hearing held on April 3 recognized that fact and made clear that the case would nevertheless go to trial, stating, "This lawyer is going to be prepared for trial on the 21st even though your client won't accept him" (*id.* at 271). At that hearing, which was called to protest Respondent's impending removal to Sandstone, Mr. Chaney made no appearance. Mr. Allison, partner of Mr. Barnhart, represented Respondent, and the court took occasion to note that its action in appointing Mr. Chaney, who was a former chairman of the Republican Party in Indiana, had been reported in the press, with some apparent suggestion that the appointment had political overtones. The court denied any such intention, saying,

> "I was perfectly willing to accept him because I enjoy and agree with his proclivities and operations in the past and proud to appoint him, but I just wanted to clarify that this is not a political case as far as the court is concerned." (*Id.* at 268.)

And the court went on to say:

> ". . . there just can't be any political significance to the appointment of the man that the Court has appointed to handle this case, despite the inferences that some have attempted to draw from it from newspaper articles, which has been very unfortunate–very unfortunate for the litigants involved in this case." (*Id.* at 269.)

Thus, Mr. Kunstler's prediction that Petitioner's actions from the bench would receive wide publicity in local newspapers (*id.* at 229) was borne out. Petitioner's own conclusion that the publicity emanating from his

actions was "unfortunate for the litigants involved in this case" was certainly true and Petitioner by his own actions in court gave this case far more publicity than anything that Mr. Kunstler had ever done.

The proceedings before the Circuit Court.

Under date of April 11, 1973, Mr. Banks filed his Petition for a Writ of Mandamus before the Seventh Circuit. A copy of that Petition appears with the papers lodged with the court, beginning at p. 275.

In his answer to the Petition for Writ of Mandamus, Judge Holder, consistent with the position he had articulated at the hearing, stated his perception of the issues, as follows:

> "[O]n the basis of this record, Judge Holder did not abuse his discretion by denying the application of Attorney Kunstler but, rather, took the only action possible under his oath of office as a judge; that is, to act in a manner under the law which would provide and guarantee the *defendant* in his criminal case with a fair trial." (Answer to Petition for Mandamus, p. 51; underscoring supplied.)

The Circuit Court rendered its decision on May 17, 1973. In its opinion the court indicated that it viewed the case as presenting important issues concerning "the extent of a defendant's right to representation by counsel of his own choosing." The Circuit Court pointed out that the district court stated that it was acting out of "deep concern for protecting the right of a defendant to a fair and impartial jury" and that since Mr. Banks had stated unequivocally that he wished Mr. Kunstler as his attorney, that was dispositive. (See opinion of Court of Appeals, p. 42, Petition for Writ of Certiorari.)

On a petition for rehearing, Judge Holder pursued an issue not theretofore asserted, namely, the balancing of "the interest of the prosecution in obtaining a fair trial

and the inherent right of the court to protect the public's interest in the orderly and fair administration of justice, on the one hand, against the defendant's Sixth Amendment right to counsel of his own choosing." The Circuit Court, after pointing out that Judge Holder had not previously presented the "broader issue," nevertheless considered it and concluded:

> "... before a trial court may properly limit the defendant's right to a chosen counsel, there must be sufficiently supported and specific findings of fact that the conduct of the defendant's attorney creates a serious and imminent threat of 'significant prejudice to the defendant himself' or of 'disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' *Magee v. Supreme Court of City and County of San Francisco*, 8 Cal. 3d 949, 506 P.2d 1023 (1973). See *Chase v. Robson*, 435 F.2d 1059 (7th Cir., 1970).
>
> "Because interference with the individual's choice of counsel should be kept to the necessary minimum, in each case the trial court must consider carefully whether a less drastic alternative, such as a narrow injunction limiting particular kinds of public statements, would suffice to protect the other interests at stake. Of course, to the extent that the defendant knowingly and intelligently endorses the conduct of his attorney in making speeches and press releases, he waives his right to claim that he has been denied his sixth amendment right to a fair and impartial trial.
>
> "The findings of respondent [Judge Holder] in this case clearly did not meet this standard. Our independent review of the record reveals that the hearing did not include this broader issue within its focus, and that the evidence with respect to the statements which could be deemed improper would not support such a conclusion." (Petition for Writ of Certiorari, pp. 46-47.)

Events since the Court of Appeals decision.

The trial of respondent has not occurred because a petition for a writ of certiorari was filed with this Court and a stay of the order of the Court of Appeals was granted by Mr. Justice Rhenquist on October 5, 1973.

Thereafter, as noted in the Peitioner's brief (p. 11), habeas corpus proceedings were brought which the district court, per the Honorable S. Hugh Dillin, another United States District Judge for the Southern District of Indiana, refused to acknowledge because Mr. Kunstler's name appeared on the papers (Petition for Writ of Certiorari, p. 52).

Following that, as appears from Respondent's motion heretofore filed, after Mr. Banks was moved to Sandstone, Minnesota, a habeas corpus proceeding was filed in Respondent's behalf by Mr. Kunstler in the United States District Court in Minnesota and Mr. Banks was released on bail therein. Though that proceeding has been pending since February 15, 1974, and Respondent has sought an evidentiary hearing, the government has yet to file an answer there and the court has not set the matter for a hearing. Instead, the government has filed a mandamus proceeding before the Eighth Circuit seeking reversal of the release on bail. As of the date of submission of this brief, the Circuit Court has not acted on the said petition.

Our statement of facts has been extensive but we believe it was required in order to give the Court a full and objective view of the case and to overcome a factual presentation which appears to have been wanting in "fairness and candor." See, *New York Central R.R. Co. v. Johnson*, 279 U.S. 310, 319 (1929).

SUMMARY OF ARGUMENT

The right to counsel means counsel of one's choice. In the federal judicial system, admission of an out-of-district lawyer who is a member in good standing of the bar of

his home state is a matter of Constitutional right. This flows from both the Sixth Amendment right to counsel and the nature of the national judicial system. And if there be any circumstances under which *pro hac vice* admission may be denied, the court would be required to act in a non-arbitrary fashion.

On the facts of this case, the refusal of the lower court to permit Respondent to have out-of-district counsel of his choice was violative of his Constitutional rights and, in addition, arbitrary. The asserted grounds for such refusal–possibility of delay in the trial and an alleged violation of rules of the court respecting pretrial publicity–were unfounded.

The lower court in fact refused to permit Respondent to have his choice of counsel because of the judge's disagreement with counsel's dissident views, a wholly impermissible basis for denying a *pro hac vice* admission.

A federal district court judge may not, in lieu of proceedings against counsel on an allegation that he engaged in conduct meriting discipline, deprive Respondent of counsel of his choice, particularly when it appears that on the facts, discipline could not be sustained against the attorney.

Court Rule 27, proscribing extrajudicial expressions of counsel, is violative of the First and Fifth Amendments because–

a) It is a blanket proscription of counsel's speech in *all* cases with no finding that such proscription was required in a particular case, an essential condition to such a regulation in the light of this Court's holdings with respect to avoidance of over-breadth, the requirements of precision of regulation in the First Amendment area, and the requirement of individualized determination where sensitive rights are affected.

b) Aside from the blanket nature of the determination, the proscriptions of Rule 27 are overbroad.

c) Rule 27 proceeds upon an impermissible standard for speech limitation, namely, a "reasonable likelihood" of interference with, rather than a "clear and present danger" to, the administration of justice.

d) Rule 27 throttles counsel for the defense but imposes no adequate limitations on the speech of law enforcement officers.

The invitation by counsel to Respondent to members of the public to come to the trial was well within Respondent's right to a public trial.

Respondent has been denied a speedy trial.

ARGUMENT

I.

A UNITED STATES DISTRICT COURT JUDGE DOES NOT HAVE THE POWER, UNDER RULES RELATING TO *PRO HAC VICE* ADMISSIONS, TO DENY SUCH ADMISSION TO AN OTHERWISE QUALIFIED ATTORNEY IN GOOD STANDING AT THE FEDERAL BAR OF HIS HOME STATE, AND, IN ANY EVENT, MAY NOT EMPLOY HIS POWER WITH RESPECT TO SUCH ADMISSION TO DENY A DEFENDANT IN A CRIMINAL CASE THE RIGHT TO HAVE COUNSEL OF HIS CHOICE.

Our submission here is that Respondent was entitled to counsel of his choice under the Sixth Amendment, and a denial to him of the opportunity to be defended at the trial by such counsel in a federal court violated a fundamental Constitutional right.

We further submit that as to federal courts, admissions of extra-district attorneys *pro hac vice* is a matter of a *defendant's* Constitutional right to select counsel of his choice, provided the attorney is in good standing at the federal bar of his home state. Additionally, we submit that even if a court is permitted in unusual circumstances to exclude an out-of-district attorney, it by no means has

uncontrolled discretion, but is required to act in a non-arbitrary fashion in the same manner as it would be required to act with respect to an in-district attorney.

The Sixth Amendment right to counsel is one of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Powell v. Alabama*, 287 U.S. 45, 67 (1932); *Hamilton v. Alabama*, 368 U.S. 52 (1961); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *White v. Maryland*, 373 U.S. 59 (1963); *United States v. Wade*, 388 U.S. 218 (1967); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); and see the most recent explication by this Court of the history of the right to counsel in Anglo-American law, *United States v. Ash*, 413 U.S. 300 (1973).

And the right to counsel means counsel of one's choice. That was the teaching in the landmark case of *Powell, supra:* "it is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice," 287 U.S. at 53; *accord, Glasser v. United States*, 315 U.S. 60, 70 (1942). And again, "[A] defendant in a state criminal trial has an unqualified right, under the Due Process Clause, to be heard through his own counsel," *In re Groban*, 352 U.S. 330, 332 (1957). In *Chandler v. Fretag*, 348 U.S. 3, 9 (1954), the Court stated firmly that a defendant's right "to be heard through his own counsel was unqualified;" and see also *Reynolds v. Cochran*, 365 U.S. 525, 530-31 (1961); *United States v. Bergamo*, 154 F.2d 31, 35 (3d Cir., 1946; *Reickhauer v. Cummingham*, 299 F.2d 170, 172 (4th Cir., 1962), cert. den., 371 U.S. 866 (1962; *Heard v. Gomez*, 321 F.2d 88 (5th Cir., 1963); *Holly v. Smyth*, 280 F.2d 536, 539-40 (4th Cir., 1960); *Lee v. United States*, 98 U.S. App. D.C. 272, 235 F.2d 219 (D.C. Cir., 1956); *Releford v. United States*, 288 F.2d 298 (9th Cir., 1961); *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir., 1960),

mod. on other grounds, 289 F.2d 928 (5th Cir., 1961); *United States v. McMann*, 386 F.2d 611, 618 (2d Cir., 1967), cert. den., 390 U.S. 958 (1968); *Backer v. C.I.R.*, 275 F.2d 141, 144 (5th Cir., 1960); *United States v. Bradford*, 238 F.2d 395, 397 (2d Cir., 1956), cert. den., 352 U.S. 1002 (1957); *Joseph v. United States*, 321 F.2d 710, 712, n. 1 (9th Cir., 1963), cert. den., 375 U.S. 977 (1964); *United States v. Pigford*, 461 F.2d 648 (4th Cir., 1972); *Lefton v. City of Hattiesburg, Miss.*, 333 F.2d 280 (5th Cir., 1964); *Sanders v. Russell*, 401 F.2d 241 (5th Cir., 1968); *Magee v. Superior Court of the City and County of San Francisco*, 8 Cal.3d 949, 106 Cal.Rptr. 647, 506 P.2d 1023 (Sup.Ct. of Cal., *In banc*, 1973). See also generally, William A. Beaney, *The Right to Counsel in American Courts*, p. 190 (University of Michigan Press, 1955); Cheatham, "The Reach of Federal Action Over the Profession of Law," 18 Stanford L.Rev. 1288, 1293.

In *United States v. Riley*, 332 F.Supp. 831, 835 (D.C. R.I., 1971), the court observed:

> "The essence and meaning of Chandler [*Chandler v. Fretag*, 348 U.S. 3 (1954)] is the right to one's own available counsel. To say this is satisfied by forcing other counsel on an accused would be a sardonic conclusion to a cherished right and it matters not whether the culprit be the state or a third party private individual, the end result is the same."

Recently, the Seventh Circuit in *United States v. Seale*, 461 F.2d 345 1 (1972) condemned the District Court's failure to make sufficient inquiry into the defendant's objections to proceeding to trial without counsel of his choice and to make allowances for the delay occasioned by chosen counsel's illness. In so holding, the court stressed that–

> "If the Sixth Amendment right to the effective assistance of counsel means anything, it certainly means that it is the actual choice of the defendant which deserves consideration." 461 F.2d at 358.

There are a few recognized limitations. A defendant seeking to have court appointed counsel does not have a right to dictate the appointment. *Cf., United States v. White*, 451 F.2d 1225 (6th Cir., 1971); *Reiff v. United States*, 299 F.2d 366 (9th Cir., 1962), cert. den. 372 U.S. 937 (1963); *Kruchten v. Eyman*, 276 F.Supp. 858, 859 (D.C. Ariz., 1967), aff'd. 406 F.2d 304 (9th Cir., 1969), mod. on other grounds, 408 U.S. 934 (1972); *United States v. Davis*, 365 F.2d 251 (6th Cir., 1966). But even here it has become the growing practice of courts to appoint counsel requested by an indigent defendant if counsel is willing.[17]

Also, where the defendant seeks to change his choice of counsel immediately before a trial, or delays choosing counsel until immediately prior to trial, a court will not permit such delays to interfere with the smooth working of its calendar. *United States v. McMann, supra*, at 618-19; *Lee v. United States, supra*, at 221. But even in those situations, the court will be very slow to override defendant's efforts to obtain counsel of his own choice. *United States v. McMann, supra*, at 618-19; *United States ex rel. Carey v. Rundle*, 409 F.2d 1210, 1214-15 (3d Cir., 1969). Especially is this so in an "unpopular" case having "First Amendment overtones," *United States v. Mitchell*, 354 F.2d 767 (2d Cir., 1966). Normally, only an indication of a bad faith toying with the court's time will result in the court's going ahead with a trial without the defendant's having counsel of his choice. *United States v.*

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[17]On this basis, Mr. Kunstler has frequently defended indigent defendents as a court appointed counsel. See, *Government of the Virgin Islands v. Gereau* (D.C. V.I.); *People v. Baker* (Sup. Ct. N.Y. Co.); *People v. Feliciano* (two cases, Sup. Ct., Bronx Co. and Sup. Ct., N.Y. Co.); *People v. H.Rap Brown* (Sup. Ct., N.Y. Co.); and *United States v. Russell Means* (D.C. S.D.).

McMann, supra, at 618-20; *Releford v. United States, supra,* at 708; *United States ex rel. Carey v. Rundle, supra,* at 1215-16; *United States v. Terry*, 449 F.2d 727, 728 (5th Cir., 1971).

Nor does the fact that counsel of the defendant's choice is required to seek admission *pro hac vice* diminish the power of the defendant to make his own choice of counsel.

In the federal judicial system, admission *pro hac vice* of counsel from another jurisdiction has been stated to be a matter of absolute Constitutional right:

> "To hold that defendants in a criminal trial may not be defended by out-of-the-district counsel selected by them is to vitiate the guarantees of the Sixth Amendment." *United States v. Bergamo,* 154 F.2d 31, 35 (3d Cir., 1946).

Even in civil litigation in federal courts, admission of out-of-district counsel has been stated as a matter of Constitutional right:

> "We are persuaded, however, that where a right has been conferred on citizens by federal law, the constitutional guarantee against its abridgment must be read to include what is necessary and appropriate for its assertion. In an age of increased specialization and high mobility of the bar, this must comprehend the right to bring to the assistance of an attorney admitted in the resident state a lawyer licensed by 'public act' of any other state who is thought best fitted for the task, and to allow him to serve in whatever manner is most effective, subject only to valid rules of court as to practice before them. Cf. Lefton v. City of Hattiesburg, 333 F.2d 280, 285 (5th Cir. 1964). Indeed, in instances where the federal claim or defense is unpopular, advice and assistance by an out-of-state lawyer may be the only

means available for vindication." *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161 (3d Cir., 1966), cert. den. 385 U.S. 987.

See also, Note, "Constitutional Right to Engage an Out-of-State Attorney," 19 Stanford L.Rev. 856 (1967).

The rule of the *Bergamo* and *Skouras*, cases, of course, follows from the unitary nature of the federal judicial system, which was created for the precise purpose of establishing "national tribunals" to overcome the presumption that otherwise "state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct or control, or be supposed to obstruct or control, the regular administration of justice," *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). It is hardly consistent with the idea of establishing national tribunals, for the purpose of overcoming local interests, to permit different branches of the national tribunals to establish their own local interests. Indeed, the rules of the United States District Court for the Southern District of Indiana provide in a manner similar to such rules in many other districts, for the ready admission of out-of-district attorneys in recognition of the fact that a national judicial system accepts appearances from lawyers throughout the nation.[18]

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[18]Rules I(a) and (b) make clear that membership in the bar of this Court entitled an out-of-district attorney to become a *permanent* member of the bar of the district court if the applicant's "private and professional character is good." Rule 1(c) providing for *pro hac vice* admissions indicates no limitation at all on such admissions of an attorney "admitted to practice in any other United States court." These rules follow:

"RULE 1

(a) The bar of this court shall consist of persons heretofore and hereafter admitted to practice by this court and who have signed the roll of attorneys, who have not been disbarred, suspended or revoked.

(b) Any attorney admitted to practice by the Supreme Court of the United States or the highest court of any state

Some cases recognize the foregoing principle even at the state court level, permitting a denial of *pro hac vice* admission only where such admission would cause "disruption of the orderly process of justice unreasonable under the circumstances of the particular case," *Magee v. Superior Court, supra.* And while occasional references may be found suggesting that intra-state *pro hac vice* admission is a matter of "grace,"[19] *cf., Cooper v. Hutchinson,* 184 F.2d 119, 122 (3d Cir., 1950); *In re Pierce,* 189 Wis. 441, 207 N.W. 966, 970 (Sup. Ct. Wis.,

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may become a member of the bar of this court upon oral motion by a member of the bar of this court if the court is satisfied that the applicant's private and professional character is good from the assurance of the movant or upon report of a committee appointed by the court. Upon being admitted the applicant shall take a prescribed oath or affirmation; pay the required fee; sign the roll of attorneys; give his post office address, and agree to notify the clerk promptly of any change thereof, whereupon his admission will be entered upon the records of this court with certificate to issue accordingly.

(c) No person shall be permitted to practice in this court or before any officer thereof as an attorney, except in his own behalf when a party, unless he has been admitted to practice in this court; *provided, however,* that an attorney admitted to practice in any other United States court may, on application to this court, be granted leave to appear in a specific action."

[19]In the state courts there is at least some basis for argument that the state has an interest in protecting the economic interests of members of the bar or the views of members of the local bar as to the proper financial relationships between an attorney and client, and for those reasons it could be contended that the power respecting *pro hac vice* admissions gives the state some basis for excluding outsiders. These interests of the state were not, however, considered sufficient to prevent a railroad union from making special arrangements with respect to the representa ion of its members, see *United Mine Workers v. Illinois Bar Association,* 389 U.S. 217 (1967), and in any event, are wholly unrelated to the role of the federal courts.

1926); *Thomas v. Cassidy*, 249 F.2d 91 (4th Cir., 1957), cert. den. 355 U.S. 958 (1958); *People of the State of New York v. Epton*, 248 F.Supp. 276, 277 (S.D.N.Y., 1965), it is clear that such admission may not be arbitrarily denied. See, *Cooper v. Hutchinson, supra*, at 122; *State v. Kavanaugh*, 52 N.J. 7, 243 A.2d 225 (1968), cert. den. *sub. nom. Matzner v. New Jersey*, 393 U.S. 924 (1969); Note, "F. Lee Bailey, Won't You Please Go Home – The *Pro Hac Vice* Blues," Utah L.Rev., 1969, p. 227.

Even the petitioner who argues against a rule of absolute entitlement to *pro hac vice* admission acknowledges that "the exercise of discretion [on an application for *pro hac vice* admission] must be reasonable and not arbitrary [and] a defendant's request to be represented by outside counsel, in association with local counsel, will be granted unless good cause for denial appears," (Petitioner's brief, p. 14).

In recent years, litigation surrounding the civil rights struggle in some of the Southern states produced a number of cases in which appellate courts have made clear that *pro hac vice* powers could not be used to deny rights to litigate with counsel of one's choice. One of the most important of those cases is *Lefton v. City of Hattiesburg*, 333 F.2d 280 (5th Cir., 1964), which involved a criminal prosecution removed to a federal court, in which the trial judge would not admit an out-of-state lawyer – by happenstance, Mr. Kunstler – in association with a number of other lawyers.

In reversing the refusal, the Circuit Court relied on both the Sixth Amendment right to counsel and First Amendment associational rights, putting special emphasis on the criminal nature of the case. It said:

> "In this context where the litigation is not brought for private gain, any regulation of the practice of

law must show 'substantial regulatory interest.' [citing *Button*, 371 U.S. at 444] . . . to justify the potential and actual inhibiting effects of the regulation on the constitutionally protected right to litigate." 333 F.2d at 286.

Earlier, the court had said, referring to court rules concerning admission and practice:

". . . such rules may not be allowed to operate in such a way as to abridge the right of any class of litigants to use the federal courts or to deny the Sixth Amendment right of criminal defendants to counsel of their choice." 333 F.2d at 285-86; emphasis supplied.

Similar considerations were involved in *Sanders v. Russell*, 401 F.2d 241 (1968), where the Fifth Circuit set aside a series of local court rules relating to *pro hac vice* appearances which were plainly designed to obstruct out-of-state counsel. Essentially, the same issues, though they came up in the context of the criminal prosecution of an out-of-state lawyer for representing local clients, were presented in *Sobol v. Perez*, 289 F.Supp. 392 (E.D. La., 1968).

And that same period produced three related cases in this Court, namely, *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963), *Brotherhood of R.R. Trainmen ex rel. Virginia State Bar*, 377 U.S. 1 (1964); and *United Mine Workers v. Illinois Bar Association*, 389 U.S. 217 (1967). Those cases, involving civil rights litigation and the legal protection of rights of workers, emphasized that the interest of a state in regulating the practice of law could not be employed to "infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest," *Brotherhood*, *supra*, at 7. Those three cases essentially confirmed that the designated classes of

litigants – Blacks in the South and union members everywhere – were Constitutionally entitled to make their own arrangements to be represented by sympathetic lawyers of their choice and that the state could not, under its conceded power to regulate the practice of law, interfere with such arrangements and force litigants to be represented by attorneys who had manifested lack of sympathy with them. See, M. Frankel, "The Alabama Lawyer, 1954-1964," 64 Col. L.Rev. 1243 (1964); J. Oppenheim, "The Abdication of the Southern Bar," in L. Friedman, ed., *Southern Justice*, pp. 127-35 (1965).

The Court in *Lefton, supra,* pointed out that the principles of *Button* and *Brotherhood* applied with even greater force where (a) a federal rather than a state court was seeking to exercise *pro hac vice* rules and (b) "since this is a criminal case, the Constitutional right of the accused to the assistance of counsel of his own choice reinforce this principle," 333 F.2d at 286.

And we might add, as Judge Medina pointed out in *United States v. Mitchell,* 354 F.2d 767 (2d Cir., 1966), the selection of counsel of one's choice has special meaning when the case is an "unpopular cause."

Respondent here is a Black man, a prisoner, jailed for refusing induction in the armed forces, charged with assaulting a guard. A more unpopular cause in Terre Haute, the community where the maximum security penitentiary is located, is hard to imagine. Above all, he should be entitled to counsel whom he trusts and whom he thinks combines empathy with the defense and the special skills which he believes his case requires. That Respondent's judgment of Mr. Kunstler's devotion and skill may be correct is borne out by the fact that it was Mr. Kunstler who managed to gain his freedom by the habeas corpus proceeding in Minnesota. It is hard to believe that locally assigned counsel would even have

considered the move which Mr. Kunstler so effectively employed on behalf of his client.

We observed at the very opening of this brief that Judge Holder was being represented in this Court by private counsel and that the Solicitor General did not join in the petition. One of the reasons may be that the government has traditionally resisted efforts in both federal and state courts to limit participation of out-of-state lawyers where federal issues might be involved. Indeed, in both *Sanders v. Russell,* and *Sobol v. Perez, supra,* the federal government filed briefs opposing the restrictions. The government's brief *amicus* in the Court of Appeals for the Fifth Circuit in *Sanders v. Russell* is particularly instructive in its definition of the government's interest and in its conception of "the federal district court as a single system of national forum.":

> "Unlike the petitioners who are in this case concerned only with this Rule's threat to full vindication of civil rights, the Department of Justice – because of its special position and responsibility – views the Rule in a broader context. We recognize that civil rights litigation is only one type of federal claim litigation, and that the Rule as to Nonresident Attorneys would be applicable to all types of federal claim litigation. Accordingly, one interest of the United States challenged by the Rule is the federal government's interest in insuring that the rights arising under federal laws, including those providing for equal civil rights, are not in any way diluted. We also recognize that the Rule governs the access to the federal courts. Accordingly, a second interest of the United States is to insure free and open access to its Courts in federal claim litigation and that interest is not limited to civil rights cases or to any particular state or region of the country. We judge this Rule in terms of the central government's conception of the

role of the federal court system in federal claim litigation. We conclude that the Rule is objectionable both because of its restriction of the right to access to the federal courts and also because of its threat to the full vindication of all federal claims.

* * *

"We start from the premise that in federal claim litigation the federal district courts throughout the United States should be viewed as a single system of national forums. . . . The goal is to have cases decided on the basis of nationwide rules of law, both substantive and procedural." Government's brief, *Sanders v. Russell*, pp. 5-7.

The foregoing, of course, referred to "federal claim" litigation and the government acknowledged that a court might have "judicial discretion" to deny admission to an attorney who had been guilty of misconduct, but the main thrust of the government's position is the unitary nature of the federal bar from which it concluded that a "heavy burden of justification is cast upon a federal court which would enforce a rule limiting the opportunity of an attorney to appear before it when that limitation is cast in terms of the particular state bar of which the attorney happens to be a member." (*Id.* at 7)

We will demonstrate that, far from meeting the "heavy burden" which the government recognized would be required to exclude a lawyer merely because he was from another jurisdiction, the facts in this case show that the action of the trial court was wholly arbitrary. And it is the analysis of the facts which will demonstrate how wholly inapposite are the cases which Petitioner cites for the proposition that an attorney may be excluded for misbehavior, *e.g.*, *State v. Kavanaugh*, 52 N.J. 7, 243 A.2d 225 (1968), cert. den., *sub. nom. Matzner v. New Jersey*, 393 U.S. 924 (1968).

II.

THE REASONS ASSIGNED BY THE PETITIONER IN HIS ORDER IN THIS CASE FOR REFUSAL TO PERMIT RESPONDENT TO HAVE COUNSEL OF HIS CHOICE WERE PLAINLY WITHOUT SUPPORT IN THE RECORD.

If the rule as to intra-district *pro hac vice* admissions in the federal court is a matter of absolute right, then it is plain that the Respondent's rights have been denied. If the trial judge was of the view that Mr. Kunstler had behaved improperly, then his course should have been exactly what he would do as to any in-district attorney, namely, permit the Respondent to have his lawyer and take such disciplinary action against the attorney as the situation might justify after due notice to the attorney and an opportunity to be heard. *Cf., In re Ruffalo,* 390 U.S. 544 (1968).

If the rule relating to *pro hac vice* admissions gives the district judge any leeway, and his action is to be tested upon some norm of the reasonableness or non-arbitrariness of its action, then it is equally clear that the district court's action cannot be sustained. That court's action was, by any standard, arbitrary as will readily appear from a comparison of what the court said was the basis for its action, with what the record showed.

A. Petitioner's alleged concern about delay.

In his brief, Petitioner for the first time presses before this Court his alleged concern with "delays in the arraignment and apparent delays in future proceedings attributable to chosen counsel." Though the foregoing appears as one of the sub-questions in the brief (p. 5), it is not mentioned in the Petition for Writ of Certiorari (p. 2) and therefore appears not to be properly before the Court (Rule 401(d)(2)).

Beyond that, however, Petitioner's asserted concern with calendaring problems appears to be questionable. Aside from the fact that the stated concern of the court was *Respondent's* interest in a speedy trial, which Respondent expressly waived so as to remove this issue (*id.* at 111, 117, 118), the Court's statements have absolutely no support in the record.

Petitioner in his order dated April 2 states on this score:

> "The record in the subject cause is replete from the first arraignment in the subject cause on December 20, 1972 with delay occasioned by petitioning attorney's failure to appear as counsel in the subject cause. Petitioning attorney's professional work load and political activity would indicate that further delay in bringing the subject cause to trial can be anticipated due to conflicts with petitioning attorney's schedule."

The record is clear that though Mr. Kunstler was contacted by Mr. Banks' family earlier, he was not finally retained until February 9. When Petitioner states in his brief (p. 18) that on December 14, 1972 [*sic;* the indictment was returned on December 17, the first appearance of Respondent in court was on December 20], "respondent represented to the court that Mr. Kunstler had been retained approximately one month previously," he is interpreting against the Respondent an ambiguous record subsequently clarified, as if no clarification had occurred.[20] It is clear that at that time Respondent was

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[20]The record reads as follows (Tr. 306):

"THE COURT: Who is your lawyer?

DEFENDANT BANKS: At the present, Morris B. Blumberg and William Kunstler.

THE COURT: Where is Mr. Blumberg?

DEFENDANT BANKS: Mr. Blumberg is on vacation, and I believe Mr. Kunstler is on the East Coast. Under

seeking to retain Mr. Kunstler, that he was still in solitary, and his communication with the outside world was highly restricted.

Neither at the attempted arraignment of December 20 nor at such attempt on January 2 did the Petitioner seem greatly concerned about delay. The first time Petitioner indicated concern for delay was on February 2, when an

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advisement from a friend of mine in New York, she tells me that they advised that at the arraignment tonight that I stand on the Fifth Amendment, and it's mandated therein anything I say now would tend to incriminate me.

THE COURT: Well, where is Mr. Kunstler?

DEFENDANT BANKS: I don't know.

THE COURT: When did you engage your counsel?

DEFENDANT BANKS: Roughly a month ago.

THE COURT: Well, sounds like they left you at the ship here.

* * * *

THE COURT: Mr. Clerk, have you heard from Mr. Kunstler, this world traveler?

THE CLERK: No.

DEFENDANT BANKS: Your Honor–

THE COURT: Have you heard from Blumberg, here?

THE CLERK: No, Your Honor.

DEFENDANT BANKS: Your Honor, one more moment, please, Mr. Blumberg is on vacation. He is the chief counsel in this case, you see.

DEFENDANT BANKS: Your Honor, *I have retained Mr. Blumberg, my attorney.*

THE COURT: You paid his fee?

DEFENDANT BANKS: Yes, sir! (emphasis supplied)

Respondent's earlier statement that he engaged counsel "roughly a month ago" was ambiguous because it did not specifically refer to Mr. Kunstler and after all Mr. Blumberg was chief counsel and had been paid a fee. The statement in Petitioner's brief quoted above is not supported by the record, which shows an ambivalent reference to Mr. Kunstler.

arraignment was scheduled and Mr. Barnhart requested a delay until Mr. Kunstler could be present. The district court was not one bit fazed by any problems of delay; it proceeded with the arraignment!

The only other occasion of delay in this case was the fact that Judge Holder had to move from March 29 to April 1 a hearing on the issue of Mr. Kunstler's *pro hac vice* admission.

Most important, there was no basis in the record from which anyone could draw a conclusion that Mr. Kunstler would not be prepared to try the case some time in May, when the court indicated it wished to try the case. Mr. Kunstler's statement on that score is undisputed. He said:

> "I am ready to try this case. I have several others which may have to be jockeyed around; that is true. But every lawyer has those problems. Courts set schedules frequently, as Your Honor knows from your long experience on the bench and your own private practice, and reasonable continuances are sometimes requested and in almost every instance granted, to conform to both court schedules and to the schedules of lawyers." (Tr. 92)

There is nothing–literally nothing–in the record from which any conclusion could be drawn suggesting that at the time Mr. Kunstler would not have been able to try the case in May if the court had determined to try it then and had not interfered with Respondent's being represented by Mr. Kunstler.

And obviously, if the court set the case for trial and counsel, because of conflict with other matters, could not be there, it would have had another remedy: It could have gone ahead with the trial, a remedy employed in any number of cases where just before trial a defendant either seeks to change counsel or for some other reason counsel is not available. For other remedies available to the court

in this eventuality (never reached in the instant record), see *United States v. McMann, supra*, 386 F.2d at 620.

The unsupported possibility that counsel would not be available is no reason for not permitting him to appear if he is available. The court could have warned Mr. Banks as to the possibilities of its proceeding if Mr. Kunstler was not available, in which case Mr. Banks would than have no alternative but to proceed with Mr. Barnhart, who was Mr. Kunstler's co-trial counsel (TR. 115)[21] and then no prejudice could possibly be claimed. *Joseph v. United States*, 321 F.2d 710, 712 (9th Cir., 1963), cert. den., 375 U.S. 977 (1964).

These are essentially the suggestions contained in the A.B.A. standards relating to "The Function of the Trial Judge" (3.5[b]):

"3.5 Attorneys from other jurisdictions.

If an attorney who is not admitted to practice in the jurisdiction of the court petitions for permission to represent a defendant, the trial judge may . . .

(b) grant such permission on condition that

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[21]Mr. Barnhart's statement on January 2 (*supra*, p. 10) indicating a limited role for himself had obviously been changed at the hearing of April 1 and the unequivocal statement of Respondent, as follows:

"Let me declare now that both Mr. Kunstler and Mr. Barnhart are my trial counsel, or co-trial counsel; I understand there is a legal distinction between local counsel and trial counsel, and that has been abolished now. These two men are both my trial counsel; I deem them as such." (Tr. 115)

On April 3, Petitioner acknowledged the Respondent had fully accepted Mr. Barnhart (*id.* at 266).

(i) the petitioning attorney associate with him as co-counsel a local attorney admitted to practice in the jurisdiction,

(ii) the local attorney will assume full responsibility for the defense if the petitioning attorney becomes unable or unwilling to perform his duties, and

(iii) the defendant consents to the foregoing conditions."

United States ex rel. Carey v. Rundle, supra, 409 F.2d 1210 (3d Cir., 1969), cited by the Petitioner, demonstrates yet another technique to assure avoidance of possible delay, namely, the appointment of stand-by counsel.

If Petitioner thought that there was any possibility that Mr. Kunstler might not be available, he could have, consistent with standard 3.5, imposed as a condition that Mr. Banks agree that if Mr. Kunstler were not available, Mr. Barnhart would proceed. He could even have appointed an independent lawyer as stand-by to take over if necessary. But neither of those remedies meant that he would deny Mr. Kunstler *pro hac vice* admission for *fear* of delay; he could have taken supplementary measures to prevent delay if a problem should develop.

In *United States v. Mitchell, supra,* the court dealt with a claim of a lower court judge that the threat of delay justified forcing a defendant to go to trial with court appointed counsel, whom he rejected, after a defendant had discharged his previously retained counsel. In language especially appropriate to this case, Judge Medina said:

"[T]he desire for expedition can furnish no justification for the subversion of the Sixth Amendment right to present an effective defense through counsel.

> "In a case where the criminal act charged and occurred nine months before, and where four months had elapsed since the indictment, it does not lie in the Government's mouth now to urge the need for such speed that the trial could not be delayed the few days necessary for defendant to find counsel."

One final point on the matter of threatened delay. The concern of the Petitioner that Respondent not suffer by possible delay in his trial, and the government's fear lest he be hurt by so much as a 24-hour delay (Tr. 31), seem to have all evaporated when the issue became whether Respondent could have Mr. Kunstler as his lawyer. When the Circuit Court ordered that Respondent have the lawyer of his choice, Petitioner pressed forward and obtained stays in the Court of Appeals and this Court, and apparently seems to have balanced the priorities so that possible delay seemed to be less important than preventing Mr. Banks from being represented by Mr. Kunstler. Indeed, nothing has happened in respect to the trial of the indictment since the Circuit Court's ruling sustaining Respondent's right to have counsel of his choice. The district court to this date has not even resolved questions relating to discovery.

B. The alleged threat that Mr. Kunstler would continue a pattern of publicity.

After setting forth what it conceived to be a "pattern of publicity," Petitioner in his order of April 2 says that it was Mr. Kunstler's insistence that he would continue to engage in that conduct which the court considered "most significant in and of itself" to sustain the denial of his

application. Three times the Petitioner says this[22] and its final conclusion was expressly based not on the prior violation of rules relating to pretrial publicity but on Mr. Kunstler's supposed insistence that he would continue to do so.

We will deal below with the question whether Mr. Kunstler did violate the rules respecting pretrial publicity. At this point we wish simply to point out that there is not a word – literally not a word – in the record wherein it appears that Mr. Kunstler stated he intended to continue any program of pretrial publicity contrary to an order of the court.

When the matter of alleged prior publicity was discussed, Mr. Kunstler in fact stated a view which was directly to the contrary:

> "I have a right to make First Amendment statements . . . unless we have a hearing and Your Honor finds after that hearing, specifically, that there was a serious and imminent threat to the administration of justice. If Your Honor finds that, then we have an issue we can treat in the appellate courts and at least

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[22] "Most significantly, the record discloses that petitioning attorney stated his intention to continue in his course of activity, in form and substance, regarding his aforementioned pretrial publicity." (Petition for Writ of Certiorari, p. 50)

* * *

"Petitioning attorney's statement that he intended both in form and substance to continue his pretrial publicity activities which are violations of the Rules of this Court is sufficient in and of itself to sustain the denial of his application to appear as counsel for the defendant in the subject cause." (*Ibid.*)

* * *

"The Court has denied the petitioning attorney's application for the reasons that petitioning attorney's stated course of future conduct will be in violation of the Rules of the Court. . . . ." (*Id.* at 51)

you have followed the Seventh Circuit's admonition." (Tr. 106)

Thus Mr. Kunstler is calling to the court's attention the procedure prescribed by the Seventh Circuit in *Chase v. Robson*, 435 F.2d 1059 (1970), and is saying to Petitioner that if he makes the finding specified by the Circuit, there will then be at least an appealable issue which the parties can "treat" in the Circuit Court. We fail to understand how that statement – an intention of possible litigation – can be read as a threat of violation of the court order if it makes the prescribed finding.

Earlier in the hearing, Mr. Kunstler had made clear his understanding of the law as enunciated by *Chase v. Robson* that press restraints could not be imposed without a prior finding of the district court judge. His statement is as follows:

"I think that Chase versus Robson is the law in the Seventh Circuit, in which this Court sits, and I intend to be guided by Chase v. Robson in this case. I think that Your Honor is bound by it, as we are bound by it, and that any press restraints in this case must contain a clear specific finding, following a hearing, that there is a 'clear and imminent threat to the administration of justice' before they are Constitutionally valid.

"So my filing or not filing a notice of appearance had nothing to do with it. I would have said the same thing I said – or may say in the future – whether I had filed a notice or had not filed a notice, because I had in mind and will continue to have in mind what the Seventh Circuit has told me is the law in this respect.

* * *

"I respect the Seventh Circuit, and will totally live up to its mandate in Chase versus Robson." (Tr. 88-89)

This is not a statement of an intention to violate an order; it is rather an invitation, if the court found it appropriate, to make an order in accordance with procedure set forth in a controlling case, at which time there was no indication whatever that it would be disobeyed. And Mr. Kunstler's statement of the then controlling law in the Seventh Circuit was clearly accurate.

Petitioner may have believed that he had the power to make Rule 27 applicable to Mr. Kunstler without a *Chase v. Robson* finding. But he never told Mr. Kunstler that that was his view of the law and that he expected Mr. Kunstler to abide thereby, *Chase v. Robson* to the contrary notwithstanding. He applied his view—if that is what it was—to Mr. Kunstler's *past* conduct while Mr. Kunstler was laboring under the misapprehension that Petitioner would recognize that *Chase v. Robson* was the law of the Seventh Circuit.

We repeat that there is nothing in the entire record upon which the court could have based its statement that Mr. Kunstler intended to continue the making of public statements of the type proscribed by Rule 27, in violation of a ruling of the court if the court made an appropriate finding that such statements threatened the trial, or in violation of a ruling by the court that such a finding was not required.

C. The claimed violations of Rule 27

At the outset it should be pointed out that at pages 6 to 9, inclusive, of Petitioner's brief, in sixteen separate paragraphs, Mr. Kunstler is charged with making statements to public audiences or to news media concerning the pending criminal case. This method of presentation by sixteen numbered paragraphs is of course designed to give the impression of an incessant program of pretrial publicity. But the record shows that what was involved was:

(i) An interview of February 9, sought out by a single news reporter in a community 95 miles away at a cocktail reception, which resulted in a news article on page 31 of that community's newspaper. There is no proof that the substance of that interview was in any way, shape, or fashion reported in the press of Terre Haute.

This accounts for items 1 to 10 of the schedule of sixteen items enumerated in the Petitioner's brief. Each of the foregoing separately numbered items is simply an extract from the one single interview with a news reporter in a community different from that from which the jury was to be selected. Any reasonable interpretation of Rule 27 would exclude statements in a community other than that from which the jury is drawn, absent some special circumstances or proof that the statement traveled from one community to the other. There was no such proof here. Moreover, nothing in the interview includes the kind of statement that Rule 27 is, or should be, really driving at: a public ventilating of detailed evidence (some perhaps inadmissible) in advance of a trial.

(ii) A press release issued by a committee which supported Mr. Banks. The issuance of the press release was by a "National Committee to Free Arthur Burghardt Banks," whose office is in New York. There was not an iota of evidence as to the distribution of the press release and specifically whether it went to a single newspaper in Indiana, let alone Terre Haute. There was no proof that any newspaper relied on it; there was no proof of the source of the quotations from Mr. Kunstler or whether he had authorized their publication. Mr. Kunstler told the court:

> "I had nothing to do with its preparation . . . [but] I am sure I agree with most of it." (Tr. 147)

* * *

"I haven't seen it before [but] those quotes reflect my opinion. And I don't remember saying them but undoubtedly I did and I would subscribe to them." (*Id.* at 150)

This statement issued in New York and with no proof of transmission to Indiana, and containing a statement of unknown date, made by Mr. Kunstler under unknown circumstances, all before he saw Mr. Banks and settled the question of his representing him, accounts for four more of the sixteen items mentioned by Petitioner (items 11 to 14). And again, a close reading of this item leaves it questionable whether under any circumstances it could be said to have violated Rule 27.

(iii) A newscast by an announcer over television station WTWO in Terre Haute is the third item in evidence and constitutes item 16 of the Petitioner's grouping of statements. Aside from the fact that there is no proof that the statements attributed to Mr. Kunstler by the newscaster were in fact uttered by him in the language set forth,[23] none of the language constitutes a violation of a single one of the six proscriptions of Rule 27.

We know of no federal rule that prohibits a lawyer from stating that attendance at trial by a support group is desirable. Beyond that, however, Rule 27 relates to the "release of information or opinion *for* dissemination by any means of public communication" (emphasis supplied). Similarly, DR 7-107 requires that circumstances be such that "a reasonable person would expect the statement to be disseminated by means of public communication." There is no proof whatever that Mr.

[23] The newscaster did not testify, nor did anyone testify who heard Mr. Kunstler's comments. Mr. Kunstler said:

"I am not going to say every word here is a quote. I mean, I assume that they are within reasonable shooting distance of the target." (Tr. 159)

Kunstler released information to the television station or that he had any reason to expect that his comments would be picked up by a newscaster from that station. The record is that Mr. Kunstler spoke to a group of mainly high school students under the age of 18 who were attending a "Third World Conference" (Tr. 152) and who had seen "a film which the National Educational Television under a grant to Mr. Banks put together on Frederick Douglass' famous speeches." (*Id.* at 153) Mr. Kunstler said, "But as far as the press is concerned, I did not invite the press to that proceeding, which was not under my control at all." (*Ibid.*)

There is no proof indeed that there was any press there, or that if there was, Mr. Kunstler had any knowledge of their presence.

(iv) Finally, there is the *Time* magazine article, Exhibit D, with the quotation from Mr. Kunstler: "The moment he [Banks] went into prison he was doomed." Obviously the foregoing statement violates no rule and of course there is no proof of when, where, or the manner in which the statement was made by Mr. Kunstler, or whether it was accurate.

Respondent submits that analysis of the actual record demonstrates that by no reasonable interpretation can it be said that Rule 27 was violated. Indeed, the determination by Petitioner that there had been a violation of Rule 27 or that Mr. Kunstler had intended to continue making public statements about the case in violation of Rule 27 is so "lacking [in] any relevant evidence . . . as to violate due process," *Vachon v. New Hampshire*, U.S. , 38 L. ed. 2d 666 (1974); *Douglas v. Buder*, 412 U.S. 430 (1973); *Thompson v. Louisville*, 362 U.S. 199 (1960); *Johnson v. Florida*, 391 U.S. 596 (1968). As this Court said in *In re Sawyer*, 360 U.S. 622, 628 (1959), "Speculation cannot take over where the proofs fail."

The expressed concern of the court for the impact upon the trial of this case of public statements by Mr. Kunstler is particularly difficult to understand because the court showed no concern for its own statements and statements of the prosecutor which the court might have realized could shape the media image in Terre Haute of both Mr. Kunstler and Mr. Banks. Particularly disturbing to the potentiality of prejudice to the defendant was the genesis and treatment of the "Angela Davis" item, which was introduced into the hearing by the Petitioner.

We have referred above, *supra*, p. 35-36 to the statements by the Petitioner made on April 3 with respect to the press coverage of the hearing of April 1, and this Court might well take judicial notice of the fact that the report of the action of the Petitioner on April 1 received front-page notice in the *Terre Haute Star* and *Terre Haute Tribune* on April 2. Though the Angela Davis item referred to by Petitioner (Tr. 222) was from the *Indianapolis News* of February 21, 1973, it was not identified or marked when it was referred to. Accordingly, Mr. Kunstler read the relevant portions of it into the record.[24] It will be observed that the statement respecting Angela Davis emanated from the *prosecutor*. Moreover, even that statement did not suggest that the *Banks* case was being funded in any way by the Angela Davis fund, a thought injected by the Petitioner (*ibid.*).

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[24] "U.S. Attorney Stanley B. Miller, said he has received mail from the Free Angela Davis and Other Political Prisoners Committee and several letters and telegrams from Germany supporting Banks." (Tr. 228)

Respondent has confirmed by reference to the February 21, 1973, issue of the *Indianapolis News* that the reading by Mr. Kunstler was accurate and included all references in the said article to Angela Davis.

The Court may wish to take judicial notice of the natural and to be anticipated consequence of the prosecutor's making this statement to the *Indianapolis* newspaper and then Petitioner's introducing the resulting story into the April 1 hearing, with an unfounded suggestion that the *Banks* case was being funded by the Angela Davis group. As a result of this sequence of events the idea of any connection between the Banks case and Angela Davis was transferred from Indianapolis to the Terre Haute community by the extensive coverage given the April 1 hearing in the Terre Haute newspapers. Mr. Kunstler and Mr. Banks vigorously contested the suggestion of Petitioner (*id.* at 226, 228), that Respondent's case was being funded by the Angela Davis group (*id.* at 226, 228). The correction rarely quite catches up with the misstatement.

D. The claim that Mr. Kunstler made certain statements after April 1, 1973 is irrelevant, unproved, and not before the Court. Beyond that, Petitioner has distorted Mr. Kunstler's alleged statements.

In Petitioner's brief, at pages 8 to 12, there are set forth three alleged statements of Mr. Kunstler made *after* April 1, 1973. At no place in the brief is it stated how such statements, if they were made, are relevant to the validity of Petitioner's order *made prior to the time that the alleged statements were made.* The Court will observe that Petitioner's brief carefully omits any reference to the dates of the alleged speeches, or to the manner in which it is contended that Mr. Kunstler's making of the speeches was proved, their context, the completeness of the excerpts, the size and nature of the audience, the tone of voice, etc.

A few points, however, will show how distorted is the Petitioner's presentation:

(i) The Court is told that the three alleged statements by Mr. Kunstler are relevant because "Mr. Kunstler *kept his promise* to make more public statements concerning *the case*" (Petitioner's brief, p. 8; emphasis supplied). No reference to the record is cited for such a "promise" and there in fact was none; this is the same contention to which we referred above at p. 58-61. Secondly, it is plain from the barest inspection even of the alleged quotations in the brief that Mr. Kunstler was not in any way talking about "the case"—in the sense of the indictment against Mr. Banks—but rather was expressing his views about the power of Judge Holder to exclude him from the trial, and some other views as to the functioning of the judicial system.

(ii) The first two of the alleged "speeches" are excerpts from affidavits submitted by Petitioner to the Circuit Court in answer to the Petition for Writ of Mandamus. The Seventh Circuit obviously did not consider them relevant to its review of what Petitioner did on April 1. The third "speech" is from a wholly different case (a habeas corpus before another judge), and is not part of the record of the mandamus which is on appeal; it occurred after the Seventh Circuit acted, and obviously could not have been considered by the Seventh Circuit.

(iii) However irrelevant and unproved, the erroneous impression sought to be created by the setting forth of these excerpted statements cannot be ignored:

> —The quotation beginning at the bottom of page 8 through page 9 consists of extracts from affidavits of two law students (one an F.B.I. agent, the other a member of the working press) who attended a talk given on April 20, 1973 by Mr. Kunstler at the Indiana University Law School in Indianapolis, entitled, "Defendant's right to counsel of his choice." The statements in the brief are

extracts from *selected* portions of a tape recording that the students claim to have made.

—The statements on page 10 of the brief attributed to Mr. Kunstler are truncated excerpts from an interview given by him to an Indianapolis radio station and transmitted by it on May 6, 1973.

—The statements on page 11 were from an interview given on October 6, 1973.

None of the affiants was put on the witness stand and cross-examined, and accordingly Respondent is in no position to be certain as to the accuracy of what they attribute to Mr. Kunstler; he is certainly in no position to comment on the significance of the portions omitted from the affidavits and simply noted with asterisks. But the brief employs a further excerpting, and what is sought to be communicated by these selected excerpts is that Mr. Kunstler was calling on people to obstruct the impending trial of Mr. Banks. What he actually said can in no way be so interpreted.

Appearing at the law school, he discussed the ramifications of the denial to a defendant of counsel of his choice. *Not a word* was mentioned about the facts of the indictment. He lectured to law students and expounded his ideas precisely in the spirit that this Court so recently recognized:

> "The college classroom with its surrounding evirons is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom." *Healy v. James*, 408 U.S. 169, 181 (1972).

He was sharply critical of Judge Holder, which he had every right to be; charged him with violating Mr. Banks' civil rights by denying him counsel of his choice; and even expressed his view that the act was criminal, a point of view that is certainly expressable (*cf.*, *Ex Parte*

Virginia, 100 U.S. 339 [1880]), and within the "prerogatives of American citizenship . . . to criticize public men [even] foolishly and without moderation," *Baumgartner v. United States*, 322 U.S. 665, 674 (1944). Omitted from the excerpt set forth in the brief was his invitation to the students at the law school to assist in research for a "thorough investigation of the jury system in the Terre Haute Division" with respect to the inclusion of Blacks, and to do other legal research.

Nowhere is the distortion of Mr. Kunstler's statements more clear than in the excerpted radio interview, the second item in the brief, where Mr. Kunstler is quoted as calling for physical confrontation and picketing of the court house. The change of meaning is achieved by the familiar process of a generous use of asterisks and omission of intermediate material which indicates that Mr. Kunstler was addressing himself to broad philosophic questions as to the relationship of the citizenry to the judiciary, as distinguished from obstructing this case. We set forth in the footnote below in parallel columns a comparison between the interview as it appears in the affidavit attached to the Petitioner's answer to the Petition for Mandamus (and the affidavit shows on its face that it, too, made a liberal use of asterisks and omissions) and the statement in the brief.[25]

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[25]The following parallel column presentation is not of the entire interview, but of such portion as commences with the quotation in the brief, where Respondent believes a change of meaning is effectuated by the process of excerpting. The asterisks on the right hand side are as they appear in the affidavit filed by Petitioner in the Seventh Circuit. Respondent does not have, and is therefore unable to fill in, the omitted material.

"I don't think anyone should respect the law, not certainly as it's practiced in America.	"I don't think anyone should respect the law, not certainly as it's practiced in America.
	* * *

We refer the Court to its opinion in *In re Sawyer*, *supra*, 360 U.S. at 630, where the Court emphasized the

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"***It [the law] is neither fair nor just, because it's manipulated and utilized. . . . And in its own procedures and practices it's unfair as well; built in, deliberately, I think, into the system. I think the best use is to distrust it, strip it of all its mysticism, to demonstrate, to fill courtrooms, to confront it.***

We would think nothing peculiar at all about picketing Congress or picketing the White House—why not picketing the Court?***

[Asked if we are ignorant of the law, Kunstler replied.]

We're ignorant of the fact, Tom, that it's mythology. We take it as something that is, as you said before, sacred. It has an aura of legitimacy about it. Many people trust it, most people trust it, I rather imagine; there is a certain essential fairness to it. All of this is untrue. It is neither fair nor just, because it's manipulated and utilized. . . . And in its own procedures and practices it's unfair as well; built in, deliberately, I think, into the system. I think the best use is to distrust it, strip it of all its mysticism; to demonstrate, to fill courtrooms, to confront it. And I think that the institution of law should be just as amenable to that process as the Congress and the President and any other of our institutions which we don't have that mystical attitude about. We would think nothing peculiar about picketing Congress or picketing the White House—why not picketing the Court? Why are they different—

importance of the context in which statements by lawyers are made, as being determinative in judging their import.

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because they wear the robes of the minister or because they have the mysticism of quietude and the aura of legitimacy? I think they're just another public institution of control, and that they should, when they go wrong, they should be confronted by the general public.

Q. What about that old cliché that's drummed into us from the time we're kids that we are a society of law and not a society of men?

Well, these are like all the other platitudes of our lives, you know, that we have a peace with honor—another platitude without meaning. And we have equal protection of the laws, and equal justice of the law—it's a mess, it's a complete mess.

I think that the only answer in all of these systems, is confrontation. Physical confrontation.***"

I think that the only answer to all of these systems, is confrontation. Physical confrontation. After you have exhaused every other means. I'm not urging people to just run in and demonstrate against the Court *ipso*

The entire matter of Mr. Kunstler's post-April 1 statements has no place in this case except as an unseemly effort to project bias against Mr. Kunstler. Mr. Kunstler does not stand charged with misconduct on the basis of those statements, and he hardly could be; they have not been proved in any manner or in a context such as would be required by the most elementary requirements of due process, and in any event those statements have nothing to do with Mr. Banks' case. Petitioner, by inclusion of this material, is asking the Court in one fell swoop to brush aside Mr. Kunstler's First Amendment rights to express his views on matters of general interest, his Fifth Amendment rights to be confronted with and have an opportunity to respond to any charges that someone might direct at him, and Mr. Banks' Sixth Amendment rights. Though Petitioner relies heavily on *In re Sawyer, supra,* he ignores the fact that the Court in that case was meticulous about limiting its review to the charges made and flatly refused to expand its consideration to charges that might have been made.

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facto. But after the Court has been given a reasonable opportunity, then I think that it is time for people to rise up and confront the Court and not stand in awe of it and not be afraid of it. People must be willing to go to jail for contempt."

III.

A UNITED STATES DISTRICT JUDGE MAY NOT DENY ADMISSION *PRO HAC VICE* TO AN OTHERWISE QUALIFIED ATTORNEY BECAUSE OF THE JUDGE'S POLITICAL DISAGREEMENT WITH COUNSEL OR HIS STATED BELIEF THAT THE POLITICAL VIEWS OF THE ATTORNEY WOULD ENDANGER THE DEFENDANT'S RIGHT TO A FAIR TRIAL, PARTICULARLY WHERE THE DEFENDANT, BEING FULLY ADVISED THEREOF, INSISTS UPON REPRESENTATION BY SUCH ATTORNEY.

Petitioner left little doubt about how he felt about Mr. Kunstler and his views; and he hardly concealed the fact that the true ground for his action in refusing admission to Mr. Kunstler was disdain for the latter's dissident views about a wide range of political questions. Though a consistent line of cases and the whole history of controversial litigation in this country support the right to practice law even though one holds dissident views, and the right of a defendant to choose his attorney, even one from outside the jurisdiction, Petitioner pressed upon Respondent his view as to what was good for Respondent as to the choice of a lawyer. His final ruling reflects the reactions which he showed from the time of the first mention of Mr. Kunstler's name.

On December 20, 1972, Mr. Banks had only to mention Mr. Kunstler's name as *secondary* counsel and Petitioner quipped a reference to "this world traveler." (Tr. 5) The transcript of the hearing on March 29 is suffused with sarcastic and hostile comments about Mr. Kunstler, whom the judge had never met, although all that had occurred was a request for a postponement of a hearing from a Saturday to the following Monday, from

an attorney who was waiting for the return of a jury verdict after a three-month trial.[26]

At the hearing of April 1, however, the attitude of the judge towards Mr. Kunstler's political views developed with absolute clarity. The court—not the U.S. Attorney—asked Mr. Kunstler what he had said to the public—not about the Banks case—but about "draft evaders and granting of amnesty" and about "prisoners of war" (*supra*, p. 24). Mr. Kunstler, though he objected to the relevance of these questions, tried in as forthright a way as possible to answer them (*supra*, pp. 24-26).

There then followed the colloquy among the judge, Mr. Kunstler, and the Respondent fully quoted above (*supra*, pp. 26-28), which finally ended with Judge Holder's phrase about Mr. Banks' carrying a "monkey" (Mr. Kunstler's views) on his back (*supra*, p. 28).

Petitioner has every right to disagree with Mr. Kunstler, as Mr. Kunstler has every right to his views. But Petitioner had no right to test Mr. Kunstler's admissibility to his court *pro hac vice* by any standard rooted in his political disagreement with Mr. Kunstler. See, *Baird v. Arizona*, 401 U.S. 1 (1971). And while the *Baird*, *Stolar* (401 U.S. 23), and *Law Students Rights Research Council* (401 U.S. 154) cases may have presented refined questions as to the scope of permissible inquiry where one deals with bar applicants, it would not appear that any of the Justices disagree with the ultimate point

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[26] "This is forty-ninth on the list. And furthermore he needed a little rest cure, because he is exhausted from the Rap case" (Tr. 60); "Let me put the English on it, here, the big casino now: Can you tell me why—can you tell me, Mr. Barnhart—I mean, Mr. Allison—Mr. Kunstler didn't enter his appearance long before this date—or make application for it—why couldn't he enter an appearance? Did he want to make these speeches without having any obligations as counsel of record?" (*Id.* at 62-63)

expressed in the opinion of Mr. Justice Stewart in *Law Students, supra*, that applicants for admission to the bar may not be excluded where there is a "showing of an intent to penalize political beliefs," 401 U.S. 154, 163, quoting from *Koenigsberg v. State Bar*, 366 U.S. 36, 54 (1961). And see also, *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Matter of Application of Levy for Admission to Practice in United States District Court, Southern District of Texas*, 348 U.S. 978 (1955). The fundamental rule is:

> "The First Amendment's protection of association prohibits a State from excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs." *Baird v. Arizona*, 401 U.S. at 6.

And if, as stated by the Court, "the practice of law is not a matter of the State's grace," making irrelevant any discussion of a "right"-"privilege" analysis (*Schware, supra*, 353 U.S. at 239, n. 5), then it would seem all the more clear that admission *pro hac vice*, and particularly in a federal court, cannot be a matter of grace and that exclusion based upon political disagreement is impermissible. As this Court so recently observed, even in a case which did not have the elements of Constitutional entitlement, such as right to counsel:

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person

> because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' " *Perry v. Sindeman*, 408 U.S. 593, 597 (1972).

Petitioner, however, gave a novel thrust to the matter of his disagreement with Mr. Kunstler's dissident views. He claimed a right to protect Mr. Banks from carrying a "monkey on his back"–Mr. Kunstler's views–despite Mr. Banks' statement that he knew exactly where Mr. Kunstler stood and wanted him.

Throughout the hearing of April 1, Petitioner, as stated by the Seventh Circuit, had focused upon his stated concern for the interests of the Respondent,[27] and in his answer before the Court of Appeals he postulated that his concern was "to act in a manner under the law which would guarantee the defendant in his criminal case with a fair trial." Absent some proof of incompetence on his part, the Respondent's insistence that he wished to be represented by Mr. Kunstler should have resolved the issue completely. That is the essence of the defendant's having *his* choice of counsel. For a judge to impose, over the objections of a defendant, the judge's beliefs as to the damage that an attorney may do to a defendant–when the defendant knows all the facts about his attorney that the judge does–is on its face arbitrary, unless the judge makes a finding that the defendant is incompetent to make the determination. No such finding was made or purported to be made; no such finding could be supported since there is no factual basis therefor. And

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[27]Tr. 116-17, 126-27, 139, 154-55, 172, 173, 174, 237, 243. The United States Attorney expressed similar concern for the Respondent, Tr. 97-98, 99-100, 101-102, 163, 232.

Petitioner's claiming in *Respondent's* interest to impose upon him the judge's notion of what is good for him is on its face an arbitrary interference with Sixth Amendment rights. No view of the power of the court respecting *pro hac vice* admissions can sustain such action.

Mr. Banks was caught in the toils of the prison discipline system, one of the controversial issues of the day. That he wished to be represented by a person of Mr. Kunstler's courage and dissidence was a matter for Mr. Banks to decide, and no one else. Respondent is not politically naive and understands what it means to pay society's price for dissidence. After all, he was sentenced to jail for five years because of his views on the Vietnam War. And he was entitled to exercise his own judgment that his best chance to make his defense was to have a lawyer who not only has wide experience but is also completely free from the impact of local community pressures. *Cf., Seals v. Wiman*, 304 F.2d 53, 68 (5th Cir., 1962).

This Court, in *N.A.A.C.P. v. Button, supra*, 371 U.S. 415, set aside a state statute which would have had the effect of preventing the reference of members of an unpopular minority to lawyers who were associated with an organization sympathetic to their cause. See also, *Brotherhood of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers v. Illinois Bar Association*, 389 U.S. 217 (1968). In each case the bar associations assured the court that there were plenty of lawyers available to represent the litigants. But the court sustained the right of litigants to have lawyers of their choice and to make their own arrangements with them.

And the history of controversial litigation is indeed studded with cases of traveling lawyers, of known dissidence, appearing as counsel, sometimes in hostile communities, to defend clients who chose them precisely because they agreed with their views.

Would Judge Raulston have had the power to "protect" John T. Scopes from appearing before a fundamentalist jury in Dayton, Tenn. with a "monkey on his back," *i.e.*, Clarence Darrow's notorious atheism? Or should Judge (later Mr. Justice) Murphy have "protected" Dr. Sweet from the possible impact of Mr. Darrow's abrasiveness upon a racist Detroit jury?

Would Judge Horton have had the power to "protect" the Scottsboro Nine from appearing before a local jury with a "monkey on their backs," namely, that foreign-born New York Jew, Liebowitz?

Would Judge Ferguson have had the power to "protect" Mr. Plessy from having as a "monkey on his back" the views of Arnold Tourgee, at the time considered a nettlesome "carpetbagger"?

And should Peter Zenger have been "protected" from the prejudice that may have followed from being represented in New York by Andrew Hamilton, that notorious libertarian from Quaker Philadelphia?

The action taken by Petitioner directly after he excluded Mr. Kunstler indicates the full reach of Petitioner's action. Respondent is a Black radical who has spent eighteen months in solitary confinement and is at issue with the inner workings of the prison system, its racial practices and its disciplinary approaches when there are racial conflicts, etc. To attempt to foist upon him as his counsel the former chairman of the Republican Party of Indiana, however good a lawyer he may be, because Petitioner agrees with his "proclivites and operations" (Tr. 268 would make a mockery of the Sixth Amendment right to counsel of one's choice.[28] Counsel of *Petitioner's* choice cannot be substituted for counsel of Respondent's choice.

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[28]One is reminded of the fact that in *Powell v. Alabama* there was also an appointment of counsel. The court there "appointed all members of the bar"! Mr. Justice Sutherland's opinion cut through the sham of such an appointment and pointed out that defendant

choice cannot be substituted for counsel of Respondent's choice.

IV.

A UNITED STATES DISTRICT COURT JUDGE MAY NOT, IN LIEU OF PROCEEDING AGAINST AN ATTORNEY FOR ALLEGED DISCIPLINARY INFRACTIONS, DEPRIVE A DEFENDANT IN A CRIMINAL CASE OF COUNSEL OF HIS CHOICE, PARTICULARLY WHERE IT APPEARS THAT ON THE FACTS DISCIPLINE COULD NOT BE SUSTAINED AGAINST THE ATTORNEY AND THERE IS NO SHOWING THAT DEPRIVATION OF THE DEFENDANT'S RIGHT TO COUNSEL IS NECESSARY TO EFFECT A JUSTIFIED CONTROL OF COUNSEL.

We begin with the assumption that there may well be both inherent and expressed powers in the courts and bar associations to discipline and control attorneys.

While Rule 27 adopted by the court does not indicate a method of enforcement, the Reardon Committee Report, upon which the rule is based, makes the following recommendations relating thereto:

"did not have the aid of counsel in any real sense." 287 U.S. 56-57. See also, *Magee v. Superior Court of the City & Co. of San Francisco, supra,* at 1025-26. And another court in recent years once sought to foist counsel upon a defendant who did not wish to be represented by him. The attorney was William Kunstler and the defendant Bobby Seale. *See United States v. Seale,* 461 F.2d 345 (7th Cir., 1972). This Court may be interested in knowing that in the recent retrial of the contempt case before Judge Gignoux he expressly sustained Mr. Kunstler's refusal to represent Mr. Seale because "Mr. Kunstler was not the attorney who was advising Mr. Seale or who was responsible for Mr. Seale's conduct during the first period of the trial while Mr. Seale was still in the trial." *In the Matter of Dellinger*, No. 72-CR-925, U.S. District Court for the Northern District of Illinois, decided December 6, 1973, Tr. 4129.

"It is recommended that violation of the standards set forth in section 1.1 shall be grounds for judicial and bar association reprimand or for suspension from practice and, in more serious cases, for disbarment. It is further recommended that any attorney or bar association be allowed to petition an appropriate court for the institution of disciplinary proceedings, either on the basis of such a petition or on its own motion."

There is a brief commentary on this standard which confirms that Rule 27 would be enforced through discipline against the attorney. The Kaufman Committee, which recommended adoption of the Reardon standard, also made clear that discipline against the lawyer was to be the enforcement technique.[29] Nowhere does the Reardon Committee or the Kaufman Committee suggest that an acceptable or recommended measure for disciplining or controlling an attorney is the denial to a defendant of the counsel of his choice.

We suppose it would be contended that even if the defendant is not the target of the rules he must be prepared to suffer the collateral consequences of justified discipline against his attorney. After all, so the argment would go, a defendant does not have the right to be represented by a disbarred attorney.

Upon this approach then, a client might be expected to suffer loss of his lawyer's services in the unusual situation that his attorney's conduct merited a punishment so severe as disbarment or possibly immediate suspension.

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[29] "Implicit in the Committee's recommendation is the assumption, fully endorsed by the Supreme Court in *Sheppard v. Maxwell, supra,* that the District Court has the inherent power by disciplinary proceedings, and in appropriate cases by contempt to punish attorneys for infractions of its rules and orders." 45 F.R.D. 391.

The correlative of that position would have to be that there is no basis for denying to the defendant the use of his attorney when the alleged infraction of his attorney does not merit a degree of punishment for the lawyer which would prevent him from functioning as such or, for that matter, any punishment. And if the punishment of the attorney is not sustainable, it does not matter that the lawyer is from outside the jurisdiction. The court—at least a federal court which is part of a national judicial system—does not obtain more power to deny a client his choice of counsel because his counsel hails from another part of that national judicial system.

Given the facts as delineated above and the record before the lower court, how can it seriously be contended that Mr. Kunstler could have been subjected to any punishment, let alone disbarment or suspension?

Of course, firstly, he would have been entitled to procedural due process, which in this case he was plainly denied. Prior to the hearing of April 1, Mr. Kunstler was given no "notice of charges" against him; he was not even given a hint of what the U.S. Attorney or the judge were complaining about. *In re Ruffalo, supra.*

But beyond the procedural question there was, as pointed out above, no showing of conduct which could sustain discipline. On the facts of this case we do not believe that by any fair reading of Rule 27 a violation can be made out. The interview with Mr. Bancroft was in a wholly different community and we assume some spatial limitation would have to be read into Rule 27 to avoid its being plainly arbitrary; there was no proof at all as to dissemination of the Committee's press release; the quotation in the *Time* article is not in violation of any of the proscriptions of Rule 27; and the talk to high school students asking them to come to court similarly violated none of the proscriptions of Rule 27, or, for that matter,

any other ethical obligation of a lawyer. See Point VI below.

But let us suppose that a court might disagree and determine by way of example that Rule 27 properly interpreted means that a lawyer may not say the things attributed to Mr. Kunstler even though he speaks in a different locale. We submit that Mr. Kunstler could nevertheless not be punished on that score in a disciplinary proceeding against him because of a failure of proof of an essential ingredient for discipline, *i.e.*, intent. See, *In re Fisher*, 179 F.2d 361 (7th Cir., 1950), cert. den., *Kerner v. Fisher*, 340 U.S. 825 (1950); *In re Ruffalo, supra*, concurring opinion of Justices White and Marshall.

As appears, *supra*, p. 18-19, there can be no dispute that Mr. Kunstler in good faith believed that *Chase v. Robson* means that proscription against public statements could not be applied absent a hearing and a finding of serious and imminent threat to the administration of justice. And by its decision in this case the Circuit Court confirmed that Mr. Kunstler read its decision correctly. How then "Can we punish a lawyer for having believed the law to be as the circuit judge . . . had thought it was?" *In re Mason*, 203 W.W.2d 750, 759 (Kansas City Court of App., Mo., 1947). In *Mason* the circuit judge had been overruled; here Mr. Kunstler's view of the law was that of *Chase v. Robson*, which was the binding law of the forum and so confirmed by the Court of Appeals. If Mr. Kunstler should ultimately be proved to have been wrong, if *Chase v. Robson* should be overruled by this Court, Mr. Kunstler can hardly be faulted for believing it to be the law before it was overruled.

And aside from the question of intent, it is the law of the forum which determines whether misconduct, when brought to the trial court's attention, would warrant

disciplinary action. So when Respondent's counsel indicated to the Petitioner that he believed that the law of *Chase* governed his First Amendment right to freedom of speech absent a prior finding of the court (Tr. 88-89), he was accurately stating the law of the forum at the time and his reliance thereon. And if Petitioner seriously believed Mr. Kunstler was not correct in his view of the law of the forum, he had an obligation so to inform him and warn him how he intended to enforce the law in his court. There is no proof in the record that had he done so, Mr. Kunstler would have violated the court's proscription. It must be remembered that all comments attributed to Mr. Kunstler and upon which the April 2 order was based were made either on February 9 or before February 26 (the date of the *Time* article), at least five weeks before Mr. Kunstler had a hint that Petitioner's view of the law was different from *Chase v. Robson*.

Nor is the situation any different with respect to Mr. Kunstler's statements after April 1. As pointed out above, those statements are in no way relevant to the April 2 rulings; none of them involved a violation of Rule 27, since Mr. Kunstler avoided discussion of the case against Mr. Banks; and while Mr. Kunstler was critical of Petitioner, he was entirely free to make such criticism, absent proof of obstruction of the judicial process. *Infra*, p. 85 ff.

Thus, by no stretch of the imagination could discipline have been sustained against Mr. Kunstler. And if the facts do not sustain discipline against Mr. Kunstler, how can they sustain collateral consequences which hurt a wholly innocent third party? If Petitioner thought that Respondent's counsel was guilty of misconduct, he should have proceeded directly against Respondent's counsel—not against Respondent by denying him counsel

of his choice—observing all the careful requirements of procedural and substantive due process that this Court has said are necessary to protect the Constitutional rights of Respondent's counsel to practice law. He cannot avoid these requirements by punishing a client who is in no way at fault.

Petitioner argues that because Respondent was seeking the assistance of out-of-district counsel this somehow gives greater power to the court to make him suffer the denial of counsel of his choice. Reliance is placed on Standard 3.5 of the A.B.A. Project on Standards for Criminal Justice, *Standards Relating to the Function of the Trial Judge*, 1972 (pp. 20-21, Petitioner's brief). Of course, those standards may not and were not intended to modify the law with respect to *pro hac vice* admissions discussed above. Beyond that Petitioner seems to have overlooked a sentence in the standard quoted on page 21 of his brief reading as follows:

> "The trial judge should apply the law of the forum in determining whether the misconduct brought to his attention would warrant disciplinary action."

Chase v. Robson was the law of the forum. And even if Petitioner did not think so, the Circuit Court, by its action on the Petition for Mandamus, confirmed its view as to the binding effect of its opinion on this case. Thus, the District Court's action is a clear case where a court has attempted to apply an unforeseeable construction of law so as effectively to deny a person due process in the sense of "fair warning that his contemplated conduct" is impermissible. *Bouie v. City of Columbia*, 378 U.S. 347, 355 (1964).

Finally, it must be emphasized that there is absolutely nothing in this record from which it could be suggested that had Judge Holder, instead of barring him, stated to Mr. Kunstler that he viewed the law differently from the

way Mr. Kunstler did, that the latter would have done anything but litigate the issue. It is this fact that destroys any possible argument that Mr. Kunstler had to be barred from the court in order to enforce in the future the rules of the court as Petitioner saw the law.

V.

COURT RULE 27 IS NOT COMPATIBLE WITH THE FREEDOM OF EXPRESSION GUARANTEED BY THE FIRST AMENDMENT AND IS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

Admitting that the First Amendment would preclude a prohibition leveled against statements like those in issue here if made by the press or other persons not counsel for parties to the litigation (Petitioner's brief, p. 23), Petitioner argues that various Constitutional limitations enunciated by this Court are not applicable to statements made by lawyers in relation to pending litigation. Petitioner argues that the single fact that a statement is made by a lawyer for a defendant in relation to pending litigation renders inapplicable the tests whether "the utterances in question are a serious and imminent threat to the administration of justice," *Craig v. Harney*, 331 U.S. 367, 373 (1947), or "that the substantive evil must be extremely serious and the degree of imminence extremely high before utterance can be punished," *Bridges v. California*, 314 U.S. 252, 263 (1941); *Pennekamp v. Florida*, 328 U.S. 331, 334 (1946); and that "to warrant a sanction '[t]he fires which [the expression] kindles must constitute an imminent, not merely a likely, threat to the administration of justice,' " *Wood v. Georgia*, 370 U.S. 375, 385 (1962) (quoting *Craig v. Harney*). Moreover, Petitioner contends that counsel's utterances may be proscribed by a blanket rule

adopted upon a standard for controlling speech which has long since been rejected and that the rule may be made applicable to every case without an individualized determination of necessity.

We proceed to an examination of a series of Constitutional deficiencies of Rule 27.

A. No rule proscribing a defense lawyer's extrajudicial statements may be applied to a case until there has been a finding that in the particular case such a proscription is necessary and justified upon some acceptable Constitutional standard which defines a serious and imminent threat to the administration of justice.

Central to every consideration of First Amendment issues is that government may not impose restrictions in that area unless there is a "compelling reason", *Cohen v. California*, 403 U.S. 15, 26 (1971), to protect a valid governmental interest and that when a restriction is imposed it not be "overbroad". *Gooding v. Wilson*, 405 U.S. 518 (1972); *Lewis v. New Orleans*, ____ U.S. ____, 39 L. ed. 2d 214 (1974). Moreover, the doctrine of least offensive alternative means requires that, before imposing any speech-restricting decree, the governmental agency imposing the restriction must "demonstrate that no alternative forms of regulation would combat [the danger] without infringing First Amendment rights." *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); see also, *Lovell v. Griffin*, 303 U.S. 444 (1937); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

And where the regulation of speech has aspects of prior restraint, as does any blanket *advance* prohibition of speech, the government "carries a heavy burden of

showing justification for the imposition of such restraint," *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); and see, *New York Times Co. v. United States*, 403 U.S. 713 (1971).

And this Court has always reserved to itself the ultimate authority and responsibility to review any claims that an intrusion into the field of free expression is justified on the basis of "compelling reason", and otherwise satisfies the requirements expressed above, whether the interference with speech is by legislative enactment (*Fiske v. Kansas*, 274 U.S. 380 [1927]) or judicial finding (*New York Times Co. v. Sullivan*, 376 U.S. 254, 285 [1964]). Similarly, the Court makes its own determination of overbreadth, *Plummer v. Illinois*, ____ U.S. ____, 38 L. ed. 2d 3 (1973).

The most decisive infirmity of Rule 27 is its blanket nature. And Petitioner expressly eschews any effort to round the sharp edges of the Rule by trying to read it as something other than a *per se* rule[30] and insisting (as he must to make it at all applicable to this case) that the authorities establish that the prohibition "contained in DR 7-107 and Rule 27 may be generally enforced without further showing of a likelihood that their violation in each individual case will seriously prejudice the administration of justice." Petitioner's brief, p. 32. Put most succinctly, Petitioner's argument is that:

> "It must be sufficient, if the objects of the Constitutional provisions which seek to guarantee impartial justice are to be achieved, that the rules governing attorney's conduct prohibit the *types* of statements which are *generally reasonably likely* to interfere with the fairness of trial." Petitioner's brief, p. 36; emphasis supplied.

We point out below that every other court which has considered the matter has disagreed with Petitioner and

[30]Mr. Justice Powell concurring in *Cason v. Ohio*, 409 U.S. 1053 (1972), and *Lewis v. New Orleans, supra*, 39 L. ed. 2d at 220.

even the Kaufman Committee obviously had its doubts about the validity of a blanket restraint. Consideration of the matter by this Court may indeed lead to a limiting interpretation. But at this point we proceed upon the position asserted by Petitioner and we put the following question:

Where is the factual foundation for the argument that there is a compelling necessity for a blanket prohibition against lawyers exercising their First Amendment rights with respect to *any* criminal case they may have?

At this point in the argument, the characteristic riposte is this Court's statement in *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966), quoted and underlined by Petitioner in his brief at p. 26, and more specifically the reference in that case to "rule and regulation":

> "The courts *must* take such steps by *rule and regulation* that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. *Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.*" (Emphasis supplied by Petitioner.)

But this Court never said it would sanction a blanket rule applicable to each and every case without a finding that it was necessary—and its use of the phrase "rule and regulation" did not authorize a sweeping away of repeated expressions of the need in the First Amendment area of "precise regulation" based upon a "compelling necessity", a demonstration that the employment of a lesser power would be inadequate, and an avoidance of "prior restraints". The "rule and regulation" referred to

in *Sheppard* could just as well be one like Rule 29, *supra*, p. 3, which requires an individualized determination of applicability rather than a blanket rule which requires no such individualized determination. Moreover, nothing in *Sheppard* suggested that a standard for regulating speech different from that heretofore followed by this Court should be the basis of any such rule or regulation.

But the argument is made that since we are dealing with First Amendment rights of an attorney and since, in the language of *Sheppard*, lawyers come "under the jurisdiction of the court," they are thereby subject to regulation by blanket order proscribing speech which would be permissible to outsiders and that a different set of standards regulates the speech of lawyers.

But lawyers are not "officers of the court" in the sense of being part of court personnel. *Cammer v. United States*, 350 U.S. 399 (1956). As the Court said in that case:

> "[A]n attorney [is] not an 'officer' within the ordinary meaning of that term. Certainly nothing that was said in *Ex parte Garland* or in any other case decided by this Court places attorneys in the same category as marshals, bailiffs, court clerks or judges. Unlike these officials, a lawyer is engaged in a private profession, important though it be to our system of justice. In general he makes his own decisions, follows his own best judgment, collects his own fees and runs his own business. The word 'officer' as it has always been applied to lawyers conveys quite a different meaning from the word 'officer' as applied to people serving as officers within the conventional meaning of that term.
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> * * *
>
> "As we pointed out in the *Nye Case*, the 1831 Act was promptly passed by the Congress after the impeachment proceedings against Judge Peck failed

by a senatorial vote of 22 to 21. Judge Peck had sent a lawyer to jail and had taken away his right to practice as punishment for an alleged contempt. The contempt consisted of published criticism of Judge Peck's opinion in a case in which the convicted lawyer had appeared as counsel; he was also counsel in other pending cases involving similar issues. Those directing the impeachment proceedings, who later brought about the passage of the 1831 Act, expressed deep concern lest lawyers continue to be subjected to summary trials by judges without the safeguards of juries and regular court procedure.

* * *

"Such statements by the same man who reported the 1831 Act to the House of Representatives [Congressman James Buchanan] almost immediately after Judge Peck's acquittal are completely inconsistent with a purpose to treat lawyers as 'officers of the court', subject to summary punishment."

And in *In re Griffiths*, 413 U.S. 717 (1973), the Court only last year repeated the foregoing and added:

"Lawyers do indeed occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts. Moreover, by virtue of their professional aptitudes and natural interests, lawyers have been leaders in government throughout the history of our country. Yet, they are not officials of government by virtue of being lawyers. Nor does the status of holding a license to practice law place one so close to the core of the political process as to make him a formulator of government policy," 413 U.S. at 729.

We recognize that to say that defense lawyers are or are not "officers of the court" does not necessarily answer the question as to whether their speech may be

regulated. It does, however, indicate that the standards of proscription of their speech, if any, must take account of their independence and that they are clearly not employees of the government—as is the prosecutor—whose speech is attributable to the government. Defense counsel is important to the administration of justice but from the moment the public begins to think that its attorneys are really part of the judicial machinery to the extent of representing the interests of the court rather than of their clients, then will we have destroyed the independence of the bar and its unique value in the American legal system "to preserve the kinds of trials that our system envisages." *In re McConnell*, 370 U.S. 230 (1962).

> "Against a 'hostile world' the accused, called to the bar of justice by his government, finds in his counsel a single voice on which he must be able to *rely with confidence* that his interests will be protected to the fullest extent consistent with the rules of procedure and the standards of professional conduct." A.B.A. *Standards Relating to the Prosecutive Function and the Defense Function*, p. 146; emphasis supplied.

Petitioner says that *Craig*, *Bridges*, *Pennekamp*, and *Wood* are all to be swept aside because none of the parties there involved was a lawyer. But in *Wood* it was a sheriff, a part of the law enforcement machinery, who was involved and the Court said that was irrelevant. Beyond that, the right of litigating lawyers to make public statements about cases in which they are involved was settled long before the four cases cited above. That is exactly what the impeachment of Judge Peck was about, as so aptly pointed out by this Court in *Cammer*, *supra*. The attorney in that case, who was in *continuing* litigation on the issue he was discussing, made a detailed argument in the public press about the merits of his case, arguing that Judge Peck was in error. Judge Peck claimed a power to hold him in contempt. While the impeach-

ment lost by one vote, Congress made sure this would never happen again by limiting the contempt power of the court to *actual obstruction* of the administration of justice, 28 U.S.C., Sec. 401, as this Court has recognized in a consistent series of decisions: *Holt v. Virginia*, 381 U.S. 131 (1965); *In re Little*, 404 U.S. 553 (1972); *In re McConnell*, 370 U.S. 230 (1961); *Ex parte Hudgings*, 249 U.S. 378 (1919).

Petitioner is arguing that because the speaker is an attorney his statement can be proscribed where similar statements of others could not. But under 18 U.S.C., Sec. 401, he could not be punished for contempt. Petitioner must therefore contend that though contempt is not available, discipline by the court short of contempt is available against an attorney who speaks but does not obstruct; or that somehow the situation changes because a court has constructed a "rule" upon which its decision was based.

Such an arugment flies in the face of the entire basis for the impeachment proceedings of Judge Peck and the enactment of 28 U.S.C., Sec. 401. Congress was not concerned with whether contempt or discipline was employed against an attorney; Congress wanted to put an end to the idea that a judge could prevent a lawyer from informing the public about his case and more particularly about the errors of a judge. Mr. (later President) James Buchanan, manager of Judge Peck's impeachment on the part of the House, hammered home at this thesis, as this Court emphasized in the portions of Mr. Buchanan's speech which it quoted.

The lesson of the Peck impeachment is that lawyers–yes, litigating lawyers–are free to talk about their cases. That point has been reiterated by this Court in its continued reminder of that milestone in American history. See, *Bridges v. California*, *supra*, 314 U.S. at 266; *Nye v. United States*, 313 U.S. 33, 45 (1941). And they

are free so to speak because, as this Court said, quoting Mr. Buchanan in the Peck impeachment:

> " 'I may be wrong, but I hold it to be the imperative duty of an attorney to protect the interests of his client *out of court* as well as in court. * * * The public have almost as deep an interest in the independence of the bar as of the bench.' " (Emphasis supplied.)

Mr. Buchanan's statement adopted by this Court is a recognition of the fact that lawyers have a role in society which may give particular value to their opinions as to the functioning of the judicial system. They are of course experts on the judicial system and generally speaking are likely to know more about a particular case than the public at large. And if the case deals with an unpopular subject, it is frequently only the attorney who is in a position to inform the public as to the abuses that may be underway and to mobilize support necessary to prevent a perversion of justice. To limit unduly the role of an attorney in discussing a particular case, even one in which he is then engaged, will seriously encroach upon the public's right to know.

In *In re Sawyer*, 360 U.S. 622 (1959), relied upon so heavily by Petitioner, this Court went out of its way to emphasize that a lawyer—even one involved in pending litigation—was entirely free to address the public and to be critical of the law, a prosecution, and even the manner in which a judge was handling a case. And such communication might well be made, as the Court pointed out, to a lay audience as well as to a professional one, because oftentimes it is popular criticism which effects changes in the law.

The interesting point about the *Sawyer* case is not only this Court's insistence on the freedom of lawyers in the midst of litigation—and in that case, a jury trial with an

unsequestered jury—to make public comment about a pending matter, but the further fact that the attorney in that case was not even charged with speech which obstructed the trial. Perhaps the reason for that was precisely the situation which we have here: "The speech was made . . . on the island of Hawaii, at Honokaa, a village some 182 miles from Honolulu [where the trial was then underway]." 360 U.S. 623. While the distance is twice the 95 miles we are dealing with, the point is the same.

Sawyer says unmistakeably:

> "We can conceive no ground whereby the pendency of litigation might be thought to make an attorney's out-of-court remarks more censurable, *other than that they might tend to obstruct the administration of justice.*" 360 U.S. at 636, emphasis added.

And Mr. Justice Stewart's concurring opinion makes the same point when he emphasizes that it had not been charged or found "that the petitioner attempted to obstruct or prejudice the due administration of justice by interfering with a fair trial" (*id.* at 647).

Sawyer and the congressional enactment following the impeachment proceeding against Judge Peck emphasize a defendant's right to get his story out to the public, even through his attorney, and the public's right to know may not be constricted except in the case of *a demonstrable showing of obstruction of the administration of justice.*

Petitioner presses the minority opinion of Mr. Justice Frankfurter in *In re Sawyer,* 360 U.S. 622, 647 (1959), as if it were the law and argues that it is applicable here because it was "concerned with a public challenge to the trial judge's integrity and impartiality." Certainly nothing that was said by Mr. Kunstler prior to April 1 approaches that even remotely. And, as explained above, the post-April 1 statements have nothing to do with Petitioner's

order of April 2. Aside from the fact that Mr. Kunstler's statements are well within the majority opinion of *In re Sawyer*, it is Mr. Kunstler, if anybody—certainly not the Respondent—who should be charged with consequences of those statements, if they are punishable. Besides, one would have thought that the opinions of this Court, in *Holt v. Virginia*, 381 U.S. 131 (1965), and *In re Little*, 404 U.S. 553 (1972), should once and for all time have settled that, even as to statements emanating from lawyers, the test is not "the vehemence of the language", *Craig v. Harney, supra*, 331 U.S. at 376, but whether there is obstruction.

A free and independent bar—free to exercise First Amendment rights—has unique values in the scheme of our system of law. We need not conclude that defense counsel are in all cases immune from control in respect to their speech if there is in fact serious and imminent threat to the administration of justice. However, the nature of the relationships between attorneys, clients, and the public, and the very important interests here involved certainly call for the kind of individualized determination which this Court required in *Cleveland Board of Education v. LaFleur*, ____ U.S. ____ , 39 L. ed. 2d 52 (1974); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Stanley v. Illinois*, 415 U.S. 645 (1972), in order to determine whether control of an attorney's speech is required to avoid a serious and imminent threat to the administration of justice.

Rule 27 in essence establishes an irrebuttable presumption that in any case, from the time of arrest until trial, any statement made for dissemination by any means of public communication by a litigating lawyer within specified categories of comment wheresoever made and however narrow the public exposure and notwithstanding the lawyer completely fails to achieve any publication of his expression, must be presumed to create "a reasonable

likelihood that dissemination of his statement will interfere with a fair trial or otherwise prejudice the due administration of justice."

If individualized determination is necessary to determine whether a pregnant teacher may teach, a college student has moved his residence, or an unwed father is fit to bring up his children, then it would certainly be required for a determination as to whether a defense lawyer may use his First Amendment rights.

Assuming that under some circumstances statements by defense counsel must be curbed because of a claimed "overriding interest" of the need to avoid obstruction of the judicial process, there is no way of avoiding an "individualized determination." Only by such a determination may it be resolved that in a particular case the fair trial interest in fact overrides the free press interest. Among the factors to be considered might be where the statement is to be made, to whom, how likely it is that the public communication will in fact reach a potential jury panel, whether the issue is of wide public interest independent of the guilt or innocence of the defendant, what the likelihood is of any publicity seriously interfering with the selection of a jury, how imminent the trial is, whether there are other means of assuring the court that a jury may be chosen which has not been affected by publicity, what proscriptions will simultaneously be imposed on law enforcement representatives?

And indeed every court which has actually dealt with the problem has in fact employed the process of individualized determination and the Kaufman Committee seemed to be veering strongly in that direction.

This is the consistent theme of the holdings of the Seventh Circuit in this case and in its earlier opinions in *Chase v. Robson* and *In re Oliver supra.* In the latter case an attorney had been disciplined for violating a certain "Policy Statement" promulgated by the United States

District Court for the Northern District of Illinois, reproduced in *In re Oliver*, 308 F. Supp. 1183 (N.D. Ill., 1970), which sought to bar all extrajudicial comments. In reversing the district court's reprimand and threat of disbarment for any future misconduct similar to that reprimanded, the Court of Appeals for the Seventh Circuit said of the "Policy Statement":

> "A blanket prohibition, such as the instant policy statement, against all comment in all cases whether tried before a judge or jury without regard to whether such comment is or even could be prejudicial to the fair administration of justice cannot stand without making a mockery of the free speech guaranty of the first amendment."

The Seventh Circuit in *Oliver* summarized its holding in *Chase v. Robson*, as follows:

> "[B]efore a trial court can limit defendants' and their attorneys' exercise of first amendment rights of freedom of speech, the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is 'a serious and imminent threat to the administration of justice.' [Citing *Craig v. Harney*, 331 U.S. 367, 373 (1947)].' *Chase* involved a challenge on first amendment grounds to an order entered in a pending criminal case which directed that the parties to the action and their counsel 'make or issue no statements, written or oral, either at a public meeting or occasion, or for public reporting or for dissemination in any fashion, regarding the jury or jurors in this case, prospective or selected, the merits of the case, the evidence, actual or anticipated, the witnesses, or the rulings of the court.' *Id.* at 1060. Since *Chase* was a criminal case tried before a jury there was some support for the order in the recommendations of the Committee on the Opera-

tion of the Jury System of the Judicial Conference of the United States, 45 F.R.D. 391, 404-407 (1969). *But even in criminal cases tried before a jury, that committee limited its suggested prohibition against dissemination of information to situations where 'there is a reasonable likelihood that such dissemination will . . . prejudice the due administration of justice.' Id.*, at 404." 452 F.2d at 114; emphasis added.

The Court will note that the Seventh Circuit interprets the Kaufman Report as requiring a finding of "reasonable likelihood that such dissemination will . . . prejudice the due administration of justice" before its suggested prohibitions would be enforced. And the United States District Court for the Northern District of Illinois, in its opinion in *Chicago Council of Lawyers v. Bauer* (Exhibit A appended to Petitioner's brief) is of the same view; see appendix to Petitioner's brief, p. 1.[31] But, as noted above, Petitioner rejects all limiting construction.

If the Seventh Circuit is wrong in its limiting construction of Rule 27, there is internal evidence within the Kaufman Report indicating that that Committee had its doubts about the validity of a "blanket rule". In no other way can one explain its recommendation C(1) (45 F.R.D.

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[31]There may be a difference between the limiting approach of *Chase* and that of the *Chicago Council of Lawyers* case: *Chase* seems to limit the applicability of the rule until there has been a prior finding of a threat to the administration of justice; *Chicago Council* would seem to allow the rule to come into effect but would permit a defense that there was a "reasonable likelihood" there was not in the given case a threat to the administration of justice. The latter is in the direction of, but hardly approaches, the kind of qualification that saved the ordinance in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), which prohibited noises or diversions adjacent to a school while in session "which disturbs or tends to disturb the peace or good order of such school session."

409), "provision for Special Orders in Widely Publicized and Sensational Cases," which has become Rule 29 of the rules of the Indiana District Court, *supra*, p. 3.

This is the provision which is the basis for orders which have been issued in recent cases surrounding Watergate. Without indicating approval of any orders issued thereunder, it is clear that the procedure under Rule 29 at least permits the Court to determine whether a proscription is in fact necessary in a given case and, if so, to tailor it to the needs of the case.

And in *United States v. Tijerina*, 412 F. 2d 661 (10th Cir., 1969), the district court, even before the issuance of the Kaufman Committee Report, fashioned a rule *with the consent of both parties* to meet the needs that all parties must have felt appropriate in that case.

Blanket rules limiting First Amendment rights, the rule of *Gitlow* and *Whitney*, *infra*, were discarded by *Yates v. United States*, 354 U.S. 298 (1957), and finally laid completely to rest by *Brandenburg v. Ohio*, 395 U.S. 444 (1969). And see, *Hess v. Indiana*, ____ U.S. ____, 38 L. ed. 2d 303 (1973). And blanket rules restricting First Amendment rights lead to absurd results. As pressed by Petitioner, an attorney in a case may not express an opinion about the innocence of his client to a newspaper reporter in Baltimore, Maryland about a disorderly conduct case pending in Cleveland, Ohio! And the newspaper reporter could be on a high school journal, or attending a convention of political scientists conducting a seminar on the improper use of criminal procedures.

That is not very far different from the way Petitioner acted in this case. Based mostly on statements made 95 miles away and with absolutely no proof of publication in the community from which a jury will be chosen, the court excludes an attorney because of violation of a rule said to have been adopted to prevent statements as to

which there is "a reasonable likelihood" of interference with a fair trial or prejudicing the due administration of justice, and he did all of this under the guise of protecting defendant's rights!

This is the ultimate consequence of the kind of blanket, unsupported prohibitions of speech contained in Rule 27.

B. Even if some limitation of speech was found to be justified in this particular case, the proscriptions of Rule 27 are nevertheless invalid because the regulation is overbroad and the court has not adopted the least drastic means necessary for achieving its purpose.

There never was a finding that the within case was a "widely publicized or sensational case" (Rule 29, supra, p. 3), authorizing an order limiting extrajudicial statements, but even if there had been, the broad proscriptions set out in Rule 27 would nevertheless be invalid because "[t]he breadth of . . . abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). The court has also said that the limitations sought to be imposed must "involve judgments not [based on] broad classifications, especially those based on subject matter." *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 100-101 (1972).

In this case Petitioner urges a complete and absolute ban on speech by an attorney within the six categories of topics enumerated in Rule 27 (1)-(6). Petitioner's brief, p. 34. This regulation of speech or expresssion by attorneys in pending criminal cases is not limited in any way as to time or place or manner, but deals with speech in terms of content and the identity of the person

exercising rights of speech, precisely the kind of proscription which this Court rejected in *Mosley, supra.* It would be hard to conceive of a rule that more broadly stifles fundamental liberties than the generalized proscription of Rule 27 when the end of preventing the obstruction of justice could be more narrowly achieved by the entry of an order tailored to the particular needs of the case under local Rule 29 promulgated by Petitioner's own district court. In that way the court could not only determine whether there were sufficiently specific findings of fact to support proscription of speech at all, but also what specific proscriptions were required. As this Court has said: "Broad prophylactic rules in the area of expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *N.A.A.C.P. v. Button, supra,* 371 U.S. at 438.

All of these demands for limiting restrictions upon First Amendment freedoms were taken into account by the Court of Appeals for the Seventh Circuit in its opinion denying the Petition for Rehearing filed by Petitioner. The Seventh Circuit believed that Petitioner had not explicitly raised what it called the broader issue:

> ". . . the task of balancing in this type of situation, the interest of the prosecution in obtaining a fair trial and the inherent right of the court to protect the public's interest in the orderly and fair administration of justice, on the one hand, against the defendant's sixth amendment right to counsel of his own choosing." Petition for Writ of Certiorari, p. 46.

Despite that, and out of an abundance of caution in exercising its appellate and supervisory power over the actions of Petitioner, the Seventh Circuit considered that broader issue and concluded that:

"... before a trial court may properly limit the defendant's right to a chosen counsel, there must be sufficiently supported and specific findings of fact that the conduct of the defendant's attorney creates a serious and imminent threat of 'significant prejudice to the defendant himself' or of 'disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' *Magee v. Superior Court of City & County of San Francisco*, 8 Cal. 3rd 949, 506 P.2d 1023 (1973). See *Chase v. Robson*, 435 F.2d 1059 (7th Cir., 1970)." *Ibid.*

Finally, it reviewed the whole record which Respondent has tried so carefully to put before this Court and concluded:

"Because interference with the individual's choice of counsel should be kept to the necessary minimum, in each case the trial court must consider carefully whether a less drastic alternative, such as a narrow injuction limiting particular kinds of public statements, would suffice to protect the other interests at stake.

* * *

"The findings of respondent [Judge Holder] in this case clearly did not meet this standard. Our independent review of the record reveals that ... the evidence with respect to the statements which could be deemed improper would not support such a conclusion.

"Petition for rehearing is denied." *Id.* at 47.

As applied to this case, Rule 27 includes none of the limitations which might reduce its overbreadth, *e.g.*, no area limitations as to proscribed speech, limitations in terms of period of time before trial when speech might be proscribed, differentiation among types of audiences and types of communication, *e.g.*, schools, fundraising groups, radio and television, careful delineation of any

limitation so as to permit free discussion of prison conditions apart from the particular indictment, etc.

Rule 27's proscription in general terms of the expression of "any opinion as to the accused's guilt" is plainly overbroad and unnecessary. While it may technically not be so in a given case, most jurors would really not be affected by the news that a defendant's lawyer thought he was innocent. The main thrust of Rule 27 is paragraph 4 with respect to the revelation of anticipated testimony, some of which might prove to be inadmissible. Mr. Kunstler never in any statement discussed such matters.

Lastly, as applied to the instant case, there was obviously no consideration at all of the other techniques which are recognizably available to abort obstruction of a trial, *e.g.*, careful screening of jurors, sequestration, change of venue.

Any thoughtful reading of the rules and regulations in question in this case must lead to the conclusion that they are unconstitutional for overbreadth and a total failure to employ the least drastic alternative means to limit fundamental freedoms protected by the First Amendment, if some limitation is demonstrated to be necessary upon some acceptable standard. See, *United States v. Dickinson*, 465 F.2d 496, 508 (5th Cir., 1972).

C. Rule 27 is invalid because it is based on an impermissible standard for regulating speech.

Rule 27, consistent with the proposals of both the Reardon and Kaufman Committees, defines the standard upon which it has imposed restrictions of speech, namely, that "there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice."

The history of the struggle to give vitality to the First Amendment has been an abandonment of the language of the English Seditious Libel cases, which punished speech which had a "bad tendency". The majority opinions of this Court in *Whitney v. California*, 274 U.S. 357 (1927), and *Gitlow v. New York*, 268 U.S. 625 (1925), proceeded upon that approach, a view of the First Amendment long since rejected by this Court. The clear and present danger test enunciated by Mr. Justice Holmes in *Schenck v. United States*, 249 U.S. 47 (1919), however much it may have been adjusted in subsequent years, see *Dennis v. United States*, 341 U.S. 494 (1951), remains the guidepost applied by this Court to test the validity of governmental regulation of speech as a "working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished," *Bridges v. California*, *supra*, 314 U.S. at 263.

The importance of *Bridges* is that there this Court applied this standard to speech deemed to threaten the administration of justice and specifically held inapplicable a standard of restriction claimed to be based on English precedent, *i.e.*, speech "*tending* to obstruct the orderly and fair administration of justice in a pending case," *ibid.* And the reason for the rejection of that standard was plainly stated as being the adoption of the First Amendment which was designed to bar in this country types of proscriptions upon speech enforced in England, including speech which threatened the administration of justice. 314 U.S. 264-66.

Petitioner argues that "this test . . . is not applicable to statements by lawyers in relation to pending litigation." Somehow or other, the status of a speaker as a lawyer in a pending litigation is supposed to diminish the degree of protection afforded by the First Amendment. But what

authority does the Peititoner cite for the foregoing radical change in the applicable standards of controlling speech? Among them are included the Reardon and Kaufman Reports, both of which are singularly silent on this particular Constitutional shift; an opinion of the Court of Appeals for the Tenth Circuit in the case of *United States v. Tijerina*, 412 F.2d 661 (1969), which dealt with a gag order to which all parties consented; the opinion of this Court in *Sheppard*, which is absolutely silent on the question of the standard upon which the court may control speech;[32] the dissenting opinion of Mr. Justice Frankfurter in *In re Sawyer*, 360 U.S. 622 (1959), a case which did not deal with the question of the Constitutional standards for controlling speech. Additionally, Petitioner cites *State v. Van Duyne*, 43 N.J. 369, 204 A.2d 841 (1964), which did not consider the Constitutional question here discussed but merely interpreted former Canon 20 of the A.B.A.'s Canons of Professional Ethics in a case dealing with prejudicial statements by *prosecuting* attorneys; and, finally, the

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[32]What this Court did say in *Sheppard* about reasonable likelihood was:

> "[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration was something the judge should have raised *sua sponte* with counsel." *Sheppard, supra*, at 363.

We suggest that this locution of "reasonable likelihood" has been wrung from its original context by the Reardon Committee and every committee that followed it and used it in an attempt to muzzle lawyers and prevent them from performing their historic function not only of defending unpopular clients but also informing the public about the issues presented in a particular case. The "reasonable likelihood" to justify changing venue has, without explanation, become a "reasonable likelihood" to curb speech!

lower court's opinion in *Chicago Council of Lawyers v. Bauer*, a copy of which is appended to the Petitioner's brief, which on this point goes no further than to cite the same authorities mentioned by Petitioner and relegates the Seventh Circuit's opinions in *Chase* and *Oliver* to a single footnote.

The Reardon Committee, the Kaufman Committee, and the Petitioner all recognize that nothing has occurred to alter the applicability of the clear and present danger standard as to speech claimed to be threatening the administration of justice and as enunciated in *Bridges*, *Pennekamp*, and *Wood*. But it is urged nevertheless that one's status as an attorney in the midst of litigation somehow alters the standard upon which speech may be controlled.

We are not called upon to insist that the impact of speech of lawyers is necessarily on exactly the same level as speech by non-lawyers. Our point here is simply this, whether it be lawyers or non-lawyers who are speaking, the *standard* which controls the Constitutionality of a restriction remains that heretofore enunciated by the Court.

What are the grounds upon which it is claimed that a lawyer could be regulated on some different standard than others? Ultimately, it comes to a contention that a lawyer is so much part of the court's machinery as to be subject to control by his status as such. This is a proposition which, as we pointed out above, was rejected by Congress 140 years after the *Peck* case and so recognized in *Cammer v. United States*, *supra*, and again last year in *In re Griffiths*, *supra*.

Nothing that we have suggested here contends for a position that under no circumstances may the freedom of expression by lawyers be limited if there is in fact a sufficiently specific finding that supports a conclusion

that there is a clear and imminent threat to the fair administration of justice. Upon such a showing, which presumably would be a precondition to the issuance of a special order under Rule 29, an order might be entered that is narrowly enough drawn to afford the protection needed both for the fair administration of justice and the freedom of expression. This Court in *Bridges v. California, supra,* expressly rejected the English system of control over publication respecting criminal proceedings. There is no basis in any case in this Court upon which a partial departure from the *Bridges* rule can be justified so that litigating lawyers may be subjected to a different *Constitutional standard* than innumerable other persons who are in a position to speak about a case.

D. Restrictions upon defense counsel are a violation not only of the First Amendment, but of Due Process of Law, particularly where no comparable limitations are placed on law enforcement authorities.

We demonstrated above that speech may not be controlled solely because the speaker was a litigating lawyer. We believe the full reach of the argument is that a defense attorney may not, consistent with the due process rights *of the client*, be muzzled, unless of course there is an interference with the administration of justice.

The defendant did not choose to be prosecuted; and if the government prosecutes, it must abide by every one of the provisions of the Constitution from trial by jury to lawyers' exercise of First Amendment rights. Prosecutors' speech may be restricted because they are on a different footing from defense counsel. When prosecutors speak, they may be effecting a denial of due process of law. *Irvin v. Dowd*, 366 U.S. 717 (1961); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

But it is a remarkable *tour de force* which would take a problem created by publicity-seeking prosecutors and other publicity harmful to a defendant[33] and turn that into a regulation of defense counsel. And even as that is done, it is the prosecutor who is given the last word. The rule stops defense lawyers from exercising their First Amendment rights to express an opinion as to the innocence of a defendant, but of course the prosecutor has the last word: he obtains an indictment. Considering the fact that it is not uncommon, particularly in a widely publicized case, for the indictment to be reprinted in full in the press, the prosecutor is free in the public press to make his charge that an accused is guilty and the defendant's counsel must not utter a word to contradict that charge! Under Rule 27, the prosecutor having by indictment expressed his opinion that a defendant is guilty, defense counsel may not express a contrary opinion.

Police officers, witnesses, the guard whom Respondent is supposed to have attacked, perhaps even a union of correction officers, the warden—all these people may talk, accurately or inaccurately, with complete protection of the First Amendment, but only the lawyer must be silent. The full import of this discrimination is clearly revealed in this case. Exhibit D, the *Time* article, contains a full statement of the Director of the Bureau of Prisons affirming Respondent's guilt and this seems permissible (see *supra*, p. 7). But a brief comment by Mr. Kunstler, not even addressing itself to guilt or innocence, is cited in support of his exclusion as counsel for Respondent.

The Kaufman Committee was fully aware of this discrimination and it said:

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[33]General Commentary by Reardon Committee, *Standards Relating to Fair Trial and Free Press*, published by A.B.A., p. 24.

"The Committee also does not at this time recommend any judicially-imposed restrictions on the release of information by federal law enforcement agencies. The Committee is encouraged by the steps which have been taken by these agencies to set their own houses in order. It is confident that with their increased awareness of the seriousness of the problems posed by prejudicial publicity, these agencies will continue to adopt measures of self-regulation without the necessity of direct intervention by the courts." 45 F.R.D. 403.

What measures of self-regulation has the government adopted to prevent the Director of the Bureau of Prisons from telling the government's side of a specific indictment to a nationwide magazine? Nothing that Mr. Kunstler ever said approaches the degree of specificity of Mr. Carlson's statement.

Aside from all the considerations referred to above, Rule 27 cannot as a matter of Due Process be sustained unless comparable restrictions were placed upon all government personnel directly or indirectly related to the case.

VI.

RESPONDENT MAY NOT BE DENIED COUNSEL OF HIS CHOICE BECAUSE HIS ATTORNEY REQUESTED PERSONS TO ATTEND THE TRIAL AND MAKE SURE THAT EVERY COURT SESSION WAS FULLY ATTENDED.

One point made by Petitioner remains to be treated, and that is the suggestion made by Respondent's counsel, to an audience which had come to see a film written by Respondent, that they attend the trial and make sure that every court session was fully attended. Petitioner again (brief, p. 36) presents this Court with an amalgam of statements made both before and after the entry of his

oral order on April 1 and his written order of April 2 in support of his exercise of discretion on those dates. The alleged statements about picketing the court house and urging physical confrontation (with all their elisions, as pointed out above) were made by Mr. Kunstler after April 1! *Supra*, p. 72. And the statement in Petitioner's order that Mr. Kunstler had asked people to fill adjacent hallways finds absolutely no support in the record in any statement made by Mr. Kunstler.[34]

Apart then from the irrelevancy of some of the factual support for Petitioner's argument, there is the telling

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[34]Those statements are described in the written order by Petitioner in this fashion: "Among public statements in Terre Haute, Indiana, petitioning attorney sought and requested certain segments of the community to support the defendant's case by, *inter alia*, filling the spectator section of the courtroom *and the adjacent hallways* thereto which, if achieved, would be a serious impediment in the Court's ability to provide the proper judicial decorum which is conducive to a fair and impartial trial and may well act to intimidate and/or alienate a jury." Petition for Writ of Certiorari, p. 49, emphasis added.

A careful perusal of the record reveals that there is no document or admission in the record that Mr. Kunstler said anything about filling the hallways. The Petitioner said (Tr. 168) that his secretary advised him that Mrs. Lowdermilk, clerk of the court, told her that a reporter told her, that Mr. Kunstler said he wanted the hallways filled. Mr. Kunstler refused to acknowledge that (*ibid.*) as he had earlier refused to stipulate to other reports of what Mrs. Lowdermilk had supposedly said to Petitioner's secretary (*id.* at 166-67) and neither the reporter, Mrs. Lowdermilk, or the Judge's secretary testified. Yet out of this triple hearsay developed by the Petitioner—not even the U.S. Attorney—the court made a finding.

This, we submit, puts in perspective the proof of the chamber of imaginary horrors conjured up in argument from this simple suggestion or request to an audience of high school students (not qualified for jury selection and most of whom were out-of-state students) to give full effect to the Constitutional guarantee of a public trial.

admission that "[N]either the Code of Professional Responsibility nor any Rule of Court in precise words prohibits an attorney from engaging in conduct of this sort. . . ." Petitioner's brief, p. 37. Despite this admission, Petitioner argues that this was an incitement of demonstrations to attempt to influence judges and juries that would seriously prejudice the fair and lawful administration of justice. This would be so, the argument continues, even if it be presumed that the demonstrations would be peaceful. It is so clear as not to require the citation of authorities that this Court has repeatedly protected concededly peaceful demonstrations. Nothing in any utterance urged by Petitioner in support of his argument suggests that Respondent's counsel was suggesting or requesting demonstrations at or around the court house.

What Petitioner labels "outside influence" (brief, p. 37) and "extraneous factors [brought] to bear on a judge and jury . . . [in] an effort to subvert the foundation of the judicial process" (*ibid.*), might more accurately be characterized as a call to young citizens to give substance and reality to the Constitution's guarantee of a public trial to one accused of crime. Public concern and attendance at trial will, of course, be no panacea for abuses of authority and discretion, but it may enable the public to see that the defendant "is fairly dealt with and not unjustly condemned, and . . . may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions . . ." 1 Cooley, *Constitutional Limitations* 647 (8th ed., 1927). Neither Respondent nor his counsel argue that he has more Constitutional rights because Respondent is a Black man who has been indicted and is to be tried while serving a previous sentence; but he does not deserve less because of those same facts.

The generality of the remarks made by Respondent's counsel is highlighted by Petitioner's admission that the remarks "are not specific as to time or place or content or noisiness or orderliness, except for his specific plea for filling the courtroom with sympathizers." Petitioner's brief, p. 38. But based upon this statement, this Court is urged to withhold Constitutional protection to Respondent's counsel to make such a statement. For the proper penalty for the statement, Petitioner argues, is to deprive the Respondent of the counsel of his choice, and his attorney of the right to represent Respondent. To support this argument Petitioner urges *Cox v. Louisiana*, No. 2, 379 U.S. 559 (1965), as the case that bears the closest analogy to this case. In that case, as Petitioner admits, this Court relied on the specificity of a narrowly drafted Louisiana criminal statute. Then, too, in *Cox* there was picketing and parading by a group of 2,000 students which was not speech in its pristine form but conduct of a totally different character. It dealt not with pure speech, but speech plus. In no way does *Cox* support the consequent restrictions imposed upon pure speech in this case. Were it otherwise, Respondent's counsel could never tell young high school students what this Court has taught, that

> "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. 257, 270 (1948).

Similarly, they might never be informed that far from being considered "outside influences" or "extraneous factors [brought] to bear on judge and jury . . . [in] an effort to subvert the foundation of the judicial process," they had every right to fill the courtroom, and that as this Court has said "without exception all courts have

held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged." *In re Oliver, supra*, 333 U.S. at 271-72.

VII.

DEFENDANT HAS BEEN DENIED A RIGHT TO A SPEEDY TRIAL AND IS ENTITLED TO HAVE THE INDICTMENT DISMISSED.

In a line of decisions by this Court developing the dimensions of the Constitutional right to a speedy trial, it has by now been clearly established that speedy trial is included within the rights deemed to be fundamental and thus secured by the Sixth Amendment. This Court's opinion in *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967), states: "The history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution." *Id.* at 226.

It is, of course, true that this Court has said that dismissal of an indictment for a denial of speedy trial is a severe remedy. *Barker v. Wingo*, 407 U.S. 514, 522 (1972). But while *Barker* set down various factors which should be considered in determining whether on balance the delay is more attributable to the prosecution or defense, this Court in *Barker* "did not deal with the remedy for denial of this right." *Strunk v. United States*, 412 U.S. 434 (1973). *Strunk* conceded, however, "that the stress from delayed trial may be less on a prisoner already confined, whose family ties and employment have been interrupted, but other factors such as the prospect of rehabilitation may also be affected adversely."

So this Court addressed itself to the remedies available once a *de facto* denial of speedy trial had been established.

On the subject of "dismissal of the indictment for a finding of a *de facto* denial of the right to speedy trial," this Court said in *Strunk* that "such severe remedies are not unique in the application of constitutional standards." *Ibid.* These principles were reaffirmed and strengthened in *Moore v. Arizona*, ____ U.S. ____, 38 L. ed. 2d 183 (1973), where this Court dealt with the possible prejudice to one incarcerated:

> "Moreover, prejudice to a defendant caused by delay in bringing him to trial is not confined to his defense in those proceedings. Inordinate delay, wholly aside from possible prejudice to a defense on the merits, may "seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *United States v. Marion*, 404 U.S. 307, 320 (1971). These factors are more serious for some than for others, but they are inevitably present in every case to some extent, for every defendant will either be incarcerated pending trial or on bail subject to substantial restrictions on his liberty.' 407 U.S., at 537 (White, J., concurring); see also *id.*, at 532-533 (majority opinion).
>
> "Some of these factors may carry quite different weight where a defendant is incarcerated after conviction in another State, but no court should overlook the possible impact pending charges might have on his prospects for parole and meaningful rehabilitation. *Strunk v. United States*, 412 U.S. 434, 439 (1973)." *Id.* at 186; footnote omitted.

All these principles seem particularly apropos in this case.

Whatever may be the state of the record in the almost incredible confusion up to the time of the Seventh Circuit's granting of the Writ of Mandamus in this case on May 17, 1973, it was clear thereafter that Respondent

wished to go forward to trial with counsel of his choice on an indictment returned almost four months after an assault alleged to have taken place almost ten months prior to the granting of the Writ. After the Circuit Court stayed the effectiveness of its grant to consider a Petition for Rehearing, Respondent filed a request for, *inter alia*, an immediate trial. Motion in Opposition to the Petition for Rehearing, pp. 2-4; and see, Petitioner's Response to Petition for Rehearing and Reply to A.B.A.'s Brief *Amicus Curiae*, pp. 13-14. And that this Court realized that issue was still in this case can be seen in the order entered by this Court, per Rehnquist, J., on October 5, 1973.

The defendant's interest in a speedy trial with counsel of his choice should have been given greater weight both by the Circuit Court and this Court upon consideration of applications for stays. This may indeed be a situtation where the appellate process, particularly if buttressed by stays, produces the very evil which the Constitutional right of speedy trial was designed to overcome. But each of these stays was on application of the government and should stand on no different footing than any other reason for the government's not proceeding with a case. Particularly is this so where one of the grounds asserted by Petitioner for his denial of Respondent's desire to be represented by Mr. Kunstler was the Petitioner's concern for a speedy trial for the benefit of Respondent.

CONCLUSION

The twin themes that emerge from this intense litigation vividly reflect a struggle on the part of the Respondent, on the one hand, to secure his Constitutional right under the Sixth Amendment to counsel of his choice and, on the other hand, a claim that the case presents a confrontation between protection of the

judiciary and freedom of the press, cast in recent years in terms of the Fair Trial-Free Press issue. On both of these questions, a rich and instructive history provides wise guidance for this Court's resolution of the case.

Respondent, a young and creative artist, has dedicated his talent to communicating to his fellow citizens the richness, the eloquence and the profundity of Frederick Douglass, a great Black American and one of the noblest statesmen in the history of our nation. Understandably, Respondent's view of the workings of the judicial machinery has been affected by the words of his mentor whom he quoted as follows in his own dramatization:

> "It is a real calamity in this country, for any man, guilty or not guilty, to be accused of crime, but it is an incomparably greater calamity for any colored man to be so accused. Justice is often painted with bandaged eyes. She is described in forensic eloquence as utterly blinded to wealth or poverty, high or low, white or black, but a mask of iron, however thick, could never blind American justice when a black man happens to be on trial. Here, even more than elsewhere, he will find all presumptions of law and evidence against him. It is not so much the business of his enemies to prove him guilty, as it is the business of himself to prove his innocence.
>
> * * *
>
> "The country in which we live is happily governed by ideas as well as laws, and no black man need despair while there is an audible and earnest assertion of justice and right on his behalf."[35]

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[35]Frederick Douglass speaking on the occasion of the 21st Anniversary of Emancipation in the District of Columbia, April 16, 1883, in the Congregational Church, Washington, D.C.

Foner, "The Life and Writings of Frederick Douglass," Vol. IV, pp. 357-358.

Faced with prosecution, Respondent sought out an "audible and earnest assertion of justice and right on his behalf" and was determined to have as his attorney a man who made his mark by spending himself without measure in an effort to secure civil rights for Blacks in the South. William M. Kunstler's efforts could not have gone unnoticed by Respondent, despite the fact that he was only seven years old when Martin Luther King, Jr. was leading the Montgomery Bus Boycott. For it was that same leader of the Southern Christian Leadership Conference who turned to out-of-state lawyers when he was prosecuted by Alabama authorities, and who authored a foreword to Mr. Kunstler's book, *Deep in My Heart*, which included the following comment:

> "As we have fought and demanded our just rights, as we have given witness with our bodies to the existence of evil, lawyers have steadfastly used their professional talents, knowledge and abilities to aid us, to make our plea for dignity heard in the courts of our land." Kunstler, *Deep in My Heart*, William Morrow & Co., Inc., 1966, p. xxii.

Petitioner's understandable plea to be represented by Mr. Kunstler is within his Constitutional right.

With regard to the second theme of Fair Trial-Free Press, the words spoken by the then Representative (later President) James Buchanan in the impeachment trial of Judge James H. Peck before the Senate of the United States still echo their warning through the years:

> "The people of this country love their judiciary well; but they love the freedom of their press still better; and if these two great branches of our civil policy shall be placed in hostile array against each other by the decision of this Senate, God only

knows what may be the consequences." Stansbury, *Report of the Trial of James H. Peck* (1883), 475.

Congressman Buchanan spoke more than 140 years ago; long before this Court rendered a series of decisions in which it has prevented other branches of the government from violating the First Amendment rights of the American people despite the strongest pleas that exceptional situations merited departure from that cornerstone of freedom. See, *New York Times Co. v. Sullivan*, *supra*, 376 U.S. 254 (1971); *Terminiello v. Chicago*, 357 U.S. 1 (1949). Mr. Buchanan's words about the "love" of "the people of this country" for freedom of the press are even more compelling today, when the value of the full availability to the people, through the press, of facts as to the working of their government is daily confirmed.

Dated: April 3, 1974.

Respectfully submitted.

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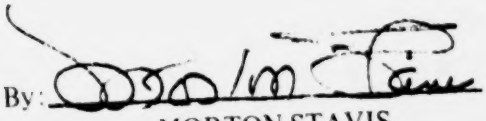
DORIS PETERSON

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of this Court, hereby certifies that on this 3rd day of April, 1974, I served a copy of the foregoing Brief of Respondent on counsel for Petitioner, by certified mail, return receipt requested, addressed to the following:

Norman P. Rowe, Esq.
810 Fletcher Trust Building
Indianapolis, Indiana 46204

By: 
MORTON STAVIS

APPENDIX A

EXHIBIT A

SUNDAY, FEBRUARY 18, 1973 — THE INDIANAPOLIS STA

Kunstler To Defend Inmate In Beating

By JOHN M. BANCROFT

William Kunstler, attorney for such controversial defendants as the Chicago 7 and H. Rap Brown, was in Indianapolis last night to raise funds for the defense of his newest client, an inmate of the Federal Penitentiary at Terre Haute.

The client is Arthur C. Banks, 25, a New York actor and playwright sentenced in 1971 to a five-year prison term for draft evasion.

Banks, who legally changed his name to Burghardt for his stage roles, has now been indicted for assaulting a guard at the Terre Haute prison last Aug. 22. The case is expected to come to trial in May.

KUNSTLER and his client claim that it was Banks who was assaulted by prison guards after he and a group of nearly 200 fellow Negro inmates protested the beating of another Negro inmate last August.

The charge against Banks, Kunstler said, "is purely retaliative . . . a cheap little way of getting back at him for being a troublemaker.

"I'm certain he was brutalized by the guards," Kunstler said. "It's a common cover-up tactic. In order to protect themselves, they filed charges against him."

"THIS IS GOING to be a much more difficult defense than that of the Chicago 7 or of the Berrigans. In those cases, we were dealing with fabricated conspiracies and that fact was obvious.

"Here, there are no Perry Mason tricks to be pulled to prove that Banks didn't strike the guard.

"Here, all the evidence is inside prison walls, under the control of the authorities who brought the charges against him," Kunstler said. "And the word of a guard is always taken over that of an inmate."

Banks was transferred from the Danbury (Conn.) Federal Correction Institute after spending five months "in the hole" there for his part in a sit-in protest.

"Arthur got into all this trouble," Kunstler said, "because he doesn't act like most of the black inmates who (Uncle) Tom it inside.

"There's a lot of antagonism against him, too, because his wife is white," he said.

DENISE SPALDING, Banks' wife, is a social worker involved in a prison arts program in New York city and state prisons.

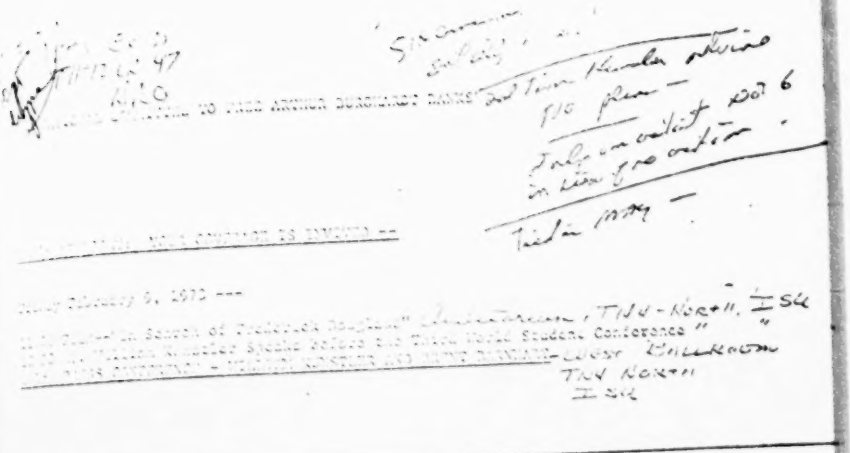
Her interest in prisons and in the plight of these incarcerated there predates her husband's conviction. She was raised on the prison farm where her father was employed and her brothers are now prison guards on the West Coast.

"Arthur's indictment follows a very clear pattern," she said. "It is an example of the technique used by the government to quiet radicals, usually those who are big, black and articulate."

Earlier yesterday, Kunstler urged those attending the Third World Student Conference at Indiana State University at Terre Haute to organize demonstration in support of Banks and to fill the courtroom with sympathetic spectators during the trial in Terre Haute.

"Anything they can do to draw attention to the trial will be welcomed," he said. "I'm not asking them to blow up the courthouse, but that would certainly draw attention."

EXHIBIT B



HEADING PRINTED TWICE DUE TO ILLEGIBILITY OF ORIGINAL COPY

THE NATIONAL COMMITTEE TO FREE ARTHUR BURGHARDT BANKS

PRESS ADVISORY: YOUR COVERAGE IS INVITED—

Friday February 9, 1973—

12:00 Film—"In Search of Frederick Douglass"
12:30 Mr. William Kunstler Speaks before the Third World Student Conference
1:15 PRESS CONFERENCE—WILLIAM KUNSTLER AND BRENT BARNHART

Mr. William Kunstler will arrive in Terre Haute to speak before the Third World Student Conference at Indiana State University, about a Black inmate, Mr. Arthur Burghardt Banks, currently in solitary confinement at the Terre Haute Federal Penitentiary, who was

arraigned February 2nd on charges of assualting a federal officer. Mr. Kunstler is defending Mr. Arthur Burghardt Banks in association with Mr. Brent Barnhart of Indianapolis.

Mr. Burghardt Banks, a noted actor and playwright, is serving a five year sentence for refusing induction into the armed forces. The new charges, which could result in an additional five year sentence, stemmed from an incident in which Mr. Burghardt Banks was severely beaten by a number of correctional officers. Mr. Burghardt Banks has been in solitary confinement since the 22nd of August, the date of the incident. (See attachment)

While in Terre Haute consulting with his client, Mr. Kunstler will speak at several locations in the Terre Haute area to familiarize the community with the nature and facts of the case, and to raise funds for Mr. Burghardt Banks' defense.

"I am proud to be associated with Mr. Burghardt Banks, as he represents the finest of the pacificist anti-war movement. He is a Black man who sent to jail for his beliefs in the value of human life and the dignity of all people, at a time when many who had much more to defend chose alternatives to incarceration," said Mr. Kunstler.

Before his incarceration Mr. Burghardt Banks starred in a film depicting the life of Frederick Douglass, the Black statesman, historian and orator of the late 19th Century, which has been shown on National Education Television's Black Journal. The film, "The Sear for Frederick Douglass" interweaves the speeches of Douglass and conversations with Burghardt. Shortly before his imprisonment Mr. Burghardt Banks appeared in two New York theaters in a one-man play adaped by him from Douglass' original

works. The film evokes the spirit of the great freedom fighter, Mr. Douglass, his relevance to all Black people today, and his special meaningfullness to Mr. Burghardt Banks. The play was done at a major Off-Broadway theatre last spring.

Mr. Kunstler sees this indictment as "a political attack by the prison administration on an individual who firmly stands for his beliefs, who is articulate and a spokesman for Black Liberation and Pacificism, and therefore a threat to the smoothe-running oppression that is so much a part of prison life in this country today. This case typifies the strategy used to quiet dissent among inmates, for the case is such that due process is virtually an impossibility."

FOR MORE INFORMATION CONTACT:

Mr. Paul O'Dell
ISU
(812) 232-6311 extension 2804

Denise Spalding
Committee to Free Arthur Burghardt Banks
P.O. Box 101
Planetarium Station
New York, New York 10023
(212) 595-5963 or (212) 873-2636

NOTE: The within Exhibit is attached in the same form as it appears in the court's file. The handwriting in the upper right hand corner of the first page is not recognized by Respondent as being one he is familiar with.

EXHIBIT C

FAMED DEFENSE ATTORNEY WILLIAM KUNSTLER CAME TO TERRE HAUTE TODAY TO SPEAK TO THE THIRD WORLD STUDENT ORGANIZATION . . THE BLACK DIVISION OF THE NATIONAL STUDENT ASSOCIATION . . KUNTSLER GAINED WORLD FAME AS DEFENSE ATTORNEY FOR THE CHICAGO SEVEN . . HE SPOKE ON BEHALF OF HIS NEW CLIENT . . BLACK ACTOR PLAYWRIGHT ARTHUR BURGHARDT BANKS . . AN INMATE AT THE TERRE HAUTE FEDERAL PENITENTIARY WHO IS SERVING A FIVE YEAR TERM FOR DRAFT EVASION . . BANKS WILL GO ON TRIAL THIS SPRING IN TERRE HAUTE FEDERAL COURT ON CHARGES OF ASSAULTING A GUARD. KUNTSLER TOLD THE GATHERING OF STUDENTS AND NEWS MEN THAT THE ONLY SUCCESSFUL WAY TO DEFEND YOUR SELF AGAINST CHARGES SUCH AS THOSE FACING BANKS IS BY CREATING A COMPLETE SUPPORT GROUP AROUND THE TRIAL THAT INCLUDES DEMONSTRATIONS . . MAKING SURE EVERY COURT SESSION HAS A FULL HOUSE AND LISTING CELEBRITIES WHO ARE INTERESTED IN THE CASE . . AND KUNTSLER HAD A COMMENT CONCERNING DRAFT EVADERS AND THE GRANTING OF AMNESTY . . . . . .

. . . . . .

SOF . . . . . 1:01 . . .

EC . . IN MY CRAW . .

. . . . . .

EXHIBIT D

TIME

THE NATION

Changing the Guard

PROTEST

"They Are Killing Me"

BURGHARDT AS FREDERICK DOUGLASS
Like a Roman candle